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In the Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

JEANNE A. JORDAN, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Under the Social Security Act, the Secretary of Health and Human Services may provide that benefits due a beneficiary who is a minor child or an incapacitated adult may be paid on his behalf to a relative or other person (a "representative payee"). Section 16 of the Social Security Disability Benefits Reform Act of 1984 requires some representative payees to make an annual accounting to the Secretary, but exempts from this requirement any representative payee who is the parent or spouse of the beneficiary and is living with the beneficiary, as well as any representative payee that is a federal or state institution in which the beneficiary resides. The question presented is whether these exemptions are unconstitutional, on the theory that the beneficiaries concerned have a procedural due process right to have their parent, spouse or institution submit an annual accounting to the Secretary.

PARTIES TO THE PROCEEDINGS

The named appellee, Jeanne A. Jordan, is the representative of a nationwide class of all recipients of benefits under Title II or Title XVI of the Social Security Act whose benefits have been paid to a representative payee at any time on or after six years prior to the filing of this action (App. 21a). Appellee Barbara Leeds was permitted to intervene as a plaintiff (App. 24a).

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The April 10, 1987 order of the district court denying the Secretary's motion for relief from judgment (App. 1a-5a)[1] is unreported. The prior orders of the district court (App. 8a-55a) are also unreported.

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[1] "App." refers to the separately bound consolidated appendix that we are filing to this jurisdictional statement and to our petition for a writ of certiorari in *Bowen* v. *Jordan*, in which we seek review of a related decision of the Tenth Circuit.

JURISDICTION

The order of the district court denying the Secretary's motion for relief from judgment and holding the relevant provisions of the Social Security Act unconstitutional was entered on April 10, 1987 (App. 1a). The notice of appeal was filed on May 8, 1987 (App. 6a-7a). On June 30, 1987, Justice White extended the time within which to docket the appeal to and including August 6, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

STATEMENT

This nationwide class action was filed in the United States District Court for the Western District of Oklahoma in 1979 to challenge procedures followed by the Secretary of Health and Human Services when he determines that a person's Social Security benefits will be paid on that person's behalf to a "representative payee." Such an arrangement is used where the beneficiary is a minor child or is an adult whose mental or physical condition prevents him from adequately managing his own affairs. There are approximately 5.3 million beneficiaries whose benefits are paid to representative payees. Approximately 3.0 million of those beneficiaries are minor children in the custody of a parent who serves as representative payee, and approximately 150,000 are adults who live with a spouse who serves as representative payee.

This case has a complex procedural history. On March 26, 1984, the district court held that the Due Process Clause requires *all* representative payees to furnish the Secretary with an annual accounting of their expenditures on the beneficiary's behalf. This direct appeal is taken from the district court's order of April 10, 1987, which denied the Secretary's mo-

tion for relief from that prior order. In the process of denying that motion, the district court held unconstitutional a provision in an intervening Act of Congress that exempts from mandatory annual accounting any representative payee who is (1) a coresident parent or spouse of the beneficiary or (2) a federal or state institution in which the beneficiary resides.

Before the intervening statute was enacted, the Secretary had taken an appeal to the Tenth Circuit from the district court's March 26, 1984, order. The Tenth Circuit, however, refused to consider the constitutionality of the intervening enactment and dismissed the Secretary's appeal. Accordingly, in addition to taking a direct appeal from the district court's April 10, 1987, order, the Solicitor General has authorized, and we will soon be filing, a petition for a writ of certiorari to review the Tenth Circuit's judgment. For convenience, and to avoid duplication, we shall state the complete procedural history of both aspects of the case here.

1. The authority to pay benefits to a "representative payee" is conferred upon the Secretary by Sections 205(j)(1) and 1631(a)(2)(A) of the Social Security Act, 42 U.S.C. (Supp. III) 405(j)(1) and 1383(a)(2)(A). The former section provides that Title II benefits may be certified for payment to a relative or other person for the beneficiary's "use and benefit," if the Secretary determines that the latter's interests would be served thereby. Similarly, 42 U.S.C. 1383(a)(2)(A) permits payment of Title XVI benefits to a spouse or other person "who is interested in or concerned with the welfare" of the beneficiary.

The Secretary has promulgated detailed regulations that govern whether payments should be made

to a representative payee and, if so, who should be selected as payee. 20 C.F.R. 404.2001 *et seq.*, 416.601 *et seq.* Benefits are routinely paid to a representative payee if the beneficiary is a minor child. In deciding whether to make payments to a representative payee on behalf of an adult, the Social Security Administration (SSA) considers such evidence as a court decision declaring the individual to be incompetent, medical evidence, or the statements of relatives or friends in a position to know the beneficiary's capabilities. 20 C.F.R. 404.2015, 416.615.

In selecting a particular representative payee, SSA considers such factors as the relationship of the person to the beneficiary, whether the person has custody of or legal authority over the beneficiary, and whether the person is in a position to know and look after the needs of the beneficiary. 20 C.F.R. 404.2020, 416.620. The regulations also specify a flexible order of preference to guide the selection of representative payees. 20 C.F.R. 404.2021, 416.621. For a beneficiary under age 18, the first preference is for a natural or adoptive parent (or a guardian) who has custody of the beneficiary. 20 C.F.R. 404.2021(b)(1), 416.621(b)(1). Succeeding preferences include a noncustodial parent who is contributing to the beneficiary's support. 20 C.F.R. 404.2021(b)(2)-(7), 416.621(b)(2)-(7). For a beneficiary aged 18 or older, the first preference is for a spouse, other relative, or legal guardian who has custody of the beneficiary or who demonstrates strong concern for his personal welfare. 20 C.F.R. 404.2021(a)(1), 416.621(a)(1). Succeeding preferences include a friend having custody and an institutional custodian. 20 C.F.R. 404.2021(a)(2)-(5), 416.621(a)(2)-(5).

The regulations specify information that must be submitted by a person who is a candidate to be a representative payee, as well as procedures by which the beneficiary may object to that person's designation. 20 C.F.R. 404.2025, 404.2030, 416.625, 416.630. Once the payee is designated, he is required to spend the Social Security payments "only for the use and benefit of the beneficiary" in a manner consistent with regulatory guidelines (20 C.F.R. 404.2035, 404.2040, 416.635, 416.640); to conserve and invest payments not needed for that purpose (20 C.F.R. 404.2045, 416.645); and to notify SSA of any change in his circumstances that would affect his performance as representative payee (20 C.F.R. 404.2035(d), 416.635(d)). The regulations also provide that SSA may select a new payee under certain circumstances. In particular, a new payee will be selected if SSA finds that the present payee has not used the payments in accordance with the prescribed guidelines; has not carried out other responsibilities under the regulations; or "[f]ails to cooperate, within a reasonable time, in providing evidence, accounting, or other information which [SSA] request[s]" (20 C.F.R. 404.2050, 416.650). The Act and implementing regulations make clear that the Secretary discharges his obligation to the beneficiary by making correct payment to the duly-selected representative payee; the representative payee, not SSA, is liable for any misuse of the funds thus paid. 42 U.S.C. 405(k); 20 C.F.R. 404.2041, 416.641.

2. a. This suit was filed in 1979 by appellee Jordan, an adult recipient of Title II disability benefits. Jordan had been found incapable of managing her own affairs, and her sister, Cathy Culp, had been designated as her representative payee. In late 1978,

a check for Jordan's retroactive benefits was sent to Culp, who was still listed as the representative payee, although Jordan apparently had moved out of Culp's house by that time. On November 13, 1978, Jordan's husband was designated as her new representative payee, and Jordan's monthly benefits thereafter were paid to him. App. 9a-10a, 23a-24a. In July 1979, at SSA's request, Culp submitted an accounting of her expenditures on Jordan's behalf. Factor Aff., Def. Reply Br. Exh. A, at 4-5 & Attachments 22, 23, 26. In 1980, Jordan received a check from SSA for the retroactive benefits previously paid to Culp (App. 11a).

The district court subsequently granted the motion of appellee Barbara Leeds to intervene (App. 24a). Leeds had been found to be disabled, and her attorney had recommended the appointment of Maude Miller, her roommate for seven years, as her representative payee. Leeds agreed to that proposal, and Miller accordingly received several benefit checks on Leeds' behalf. On April 27, 1977, however, Leeds applied to receive direct payment of her benefits, and SSA approved that application. At SSA's request, Miller then submitted an accounting, and SSA approved that accounting on August 4, 1977. Leeds subsequently alleged that Miller had misused $2,258 of the funds, but, after another review of the case, SSA found that there had been no misuse. App. 24a-25a; Factor Aff., Def. Reply Br. Exh. B, at 3-5 & Attachments 11-16.

b. On September 26, 1980, the district court certified a nationwide class, represented by Jordan, consisting of all recipients of Title II or Title XVI benefits in representative-payee status (App. 8a-22a). On March 17, 1983, the court held that the Due Process

Clause requires mandatory periodic accounting by all representative payees (*id.* at 23a-40a). The court acknowledged the results of an SSA study showing that misuse of funds was identified in only 0.5% of the cases in a sample of representative-payee cases. The court also acknowledged the Secretary's comprehensive procedures for selection of representative payees, as well as his discretion to order an accounting in appropriate circumstances (*id.* at 34a). After summarizing appellees' contrary arguments, however, the court asserted that the risk of erroneous deprivation of the beneficiaries' interest in the proper use of their benefits is great under existing procedures, and that the probable value of universal mandatory accounting is substantial (*id.* at 36a-37a, citing *Matthews* v. *Eldridge*, 424 U.S. 319, 335 (1976)). The district court therefore ordered the Secretary to implement appropriate accounting procedures within one year (App. 37a).[2]

2. In response to the district court's March 1983 order, SSA formulated a plan under which all representative payees would be notified that they must maintain records regarding the use of payments, but an actual report would be required only of a random sample of 10% of all payees each year. App. 42a,

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[2] The district court rejected appellees' claim of a statutory and due process right to an administrative hearing and judicial review of SSA's determinations in response to allegations of possible misuse of benefits (App. 37a-40a). Appellees appealed that ruling, but the court of appeals affirmed (App. 63a-72a). See note 6, *infra*. The district court also rejected appellees' contention that they have a due process right to a hearing prior to SSA's selection of a representative payee (App. 26a-33a). Appellees did not appeal that ruling (see *id.* at 64a-65a). These questions are not involved here.

58a. The Secretary contended that this approach was appropriate because SSA could not annually review accounting forms submitted by all representative payees, and that the 10%-sample approach therefore would minimize needless paperwork for all concerned. On March 26, 1984, the district court rejected the Secretary's proposal and ordered the Secretary to institute universal annual accounting (App. 41a-43a).[3]

3. The Secretary filed a notice of appeal to the Tenth Circuit from the district court's March 26, 1984 order. Before that appeal was briefed and argued, however, Congress enacted the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794. Section 16 of that Act (98 Stat. 1809-1811) made several amendments to the statute's representative-payee provisions. These amendments, among other things, increased the criminal penalties for misuse of funds by representative payees (see 42 U.S.C. (Supp. III) 408, 1383a), and sought to ensure careful selection of such payees in the first instance (see 42 U.S.C. (Supp. III) 405 (j)(2), 1383(a)(2)(B)).

Of particular relevance here, Congress also directed the Secretary to establish a monitoring system under which representative payees "shall report not less often than annually with respect to the use of [Social Security] payments," with a sample of those reports

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[3] On July 2, 1984, the district court granted the Secretary's motion to amend the March 26, 1984, order to exclude from the annual accounting requirement all federal and state facilities for the mentally ill or retarded that serve as representative payees (App. 44a-47a). The court concluded that on-site inspections and other monitoring of those facilities would furnish adequate protection (*id.* at 47a).

to be reviewed to identify instances of possible misuse. 42 U.S.C. (Supp. III) 405(j)(3)(A), 1383(a)(2)(C)(i). However, Congress expressly *excluded* from this annual accounting requirement the vast bulk of representative payees, *i.e.*, those who are the parent or spouse of the beneficiary and live in the same household as the beneficiary. For those payees, the Secretary is required only to verify periodically that the beneficiary and payee continue to live together. 42 U.S.C. (Supp. III) 405(j)(3)(B), 1383(a)(2)(C)(ii). The amendments further provide that, notwithstanding this general conclusion, the Secretary may require a report at any time if he "has reason to believe" that the representative payee is misusing the payments. 42 U.S.C. (Supp. III) 405(j)(3)(E), 1383(a)(2)(C)(v).[4]

The legislative history of the 1984 Act makes clear that these exclusions from the annual accounting requirement were enacted because of Congress's specific disagreement with the district court's March 26, 1984, order in this case. The Senate Report explained that prior to 1978, all payees—except custodial parents and spouses, legal guardians, and state and federal institutions—had been required to make an annual accounting, but that the accounting program had been suspended as a work-saving measure between 1978 and 1984. S. Rep. 98-466, 98th Cong., 2d Sess. 29 (1984). The report then stated (*ibid.*):

> In March 1983, a Federal district court ordered the Social Security Administration (SSA) to institute a system of periodic mandatory payee accounting within 1 year. *Jordan* v. *Heckler*.

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[4] The 1984 Act also exempts federal and state institutions serving as payees from the annual accounting requirement. 42 U.S.C. (Supp. III) 405(j)(3)(C) and (D), 1383(a)(2)(C)(iii) and (iv).

> In March 1984, SSA implemented an accounting system under which a random sample of 10 percent of all payees are required to account annually. At the request of the plaintiff, the court subsequently revised its order in *Jordan* so as to require an annual accounting from all payees.

The report noted that the 1984 Act contained various provisions designed to improve representative-payee procedures, but concluded (*id.* at 29 (emphasis added)):

> At the same time, the Committee amendment recognizes that *it is neither necessary nor appropriate to require governmental supervision or detailed accounting in the case of close familial relationships* (*parent and child or spouses living together*) absent some allegation or overt reason to suspect the possibility of misuse of funds.

The amendments giving effect to this Congressional intent were made effective as of October 9, 1984 (§ 16(d), 98 Stat. 1811).

4. After the enactment of the 1984 amendments, the Secretary sought in two different ways to have the courts in this case consider the effect of that intervening legislation.

a. First, the Secretary filed a motion with the district court for an "indicative ruling" and for relief from judgment under Fed. R. Civ. P. 60(b), contending that the new statutory procedures afforded a constitutionally adequate system of monitoring. The district court ruled on that motion in an order dated January 18, 1985 (App. 48a-55a). It there held that it was "without jurisdiction to rule on a motion for relief from judgment pursuant to Rule 60(b)" because the case was then pending on appeal to the Tenth Circuit (App. 48a; see *id.* at 51a, 55a).

The court went on to state, however, that it would "grant defendant's motion for an indicative ruling and advise the parties that were such a motion [for relief from judgment] presented, it would be denied" (App. 48a). The court recognized that "[i]mplicit in Congress' exception [in the 1984 Act] for spouses and parents who live in the same house is the assumption that a representative payee who is closely related to the beneficiary need not be monitored as closely as others" (*id.* at 53a n.2). The court nevertheless pointed out that it had "quite specifically ruled" that the Due Process Clause requires mandatory periodic accounting. The court then reaffirmed its view that such accounting (or its functional equivalent, such as on-site inspection of institutions) was required for *all* representative payees, notwithstanding Congress's contrary decision (*id.* at 54a).[5]

Because the district court stated in its January 18, 1985, order that it did not have jurisdiction to entertain a Rule 60(b) motion for relief from judgment, the Secretary did not take an appeal from that order insofar as it purported to give only an "indicative ruling."

b. The Secretary then sought to have the Tenth Circuit address the constitutionality of the 1984 Act in its consideration of the Secretary's pending appeal. In the March 26, 1984, order that was the subject of

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[5] The court's only response to Congress's determination that co-resident parents and spouses do not need to be monitored as closely as other payees was to point to the fact that appellee Jordan "challenged the propriety of her *sister's* actions while her sister acted as Jordan's representative payee" (App. 53a n.2 (emphasis added)). A sister, of course, is not excluded from the annual reporting requirement under the 1984 Act even if she lives with the beneficiary.

that appeal, the district court (1) had rejected the Secretary's proposal for reporting by a 10% sample of beneficiaries and (2) had ordered the Secretary to require annual reporting by *all* representative payees (App. 42a-43a). On appeal, the Secretary did not challenge the first aspect of the district court's ruling, since Congress in the 1984 Act had rejected the 10%-sample approach and had instead mandated accounting by all representative payees except those specifically excluded. The Secretary did challenge the second aspect of the district court's ruling, however, contending that the court of appeals was required to apply the intervening change in the law and thus to exclude the statutorily-specified persons from the universal accounting ordered by the district court (C.A. Br. 17, citing *Bradley* v. *Richmond School Board*, 416 U.S. 696, 714 (1974)). The Secretary accordingly informed the court (C.A. Br. 14): "Since there is now a statutorily-required accounting program, * * * the only issue on appeal now is whether Congress's decision to exempt certain payees from the accounting program satisfies the requirements of due process." The remainder of the Secretary's brief was devoted to a defense of the constitutionality of Congress's exemption of co-resident parents and spouses from the annual accounting requirement. C.A. Br. 17-28.

On January 5, 1987, the court of appeals dismissed the Secretary's appeal (App. 56a-62a). Although the district court order under review had required annual accounting by *all* representative payees, and although the Secretary's argument on appeal had defended the intervening Act of Congress that provided for annual accounting by *fewer than all* payees, the court of appeals asserted that the Secretary had "abandoned any

challenge to the order from which the appeal is taken" (*id.* at 61a). The court apparently was of the view that the Secretary could challenge the district court's order only by arguing that the 10%-sample approach he originally proposed was consistent with due process, even though that proposal had since been superseded by the 1984 Act (*id.* at 60a-61a).

The court of appeals also declined to consider the constitutionality of the 1984 Act, on the ground that the Secretary had not taken an appeal from the district court's January 18, 1985, order (App. 61a-62a). Although the district court had stated in that order that it was only granting an "indicative ruling" and that it was "without jurisdiction to rule on a motion for relief from judgment" (App. 48a), the court of appeals held that, under its prior decision in *Aune* v. *Reynders*, 344 F.2d 835 (10th Cir. 1965), the district court in fact *did have* jurisdiction to deny a Rule 60 (b) motion while the appeal was pending (App. 51a-62a). The court of appeals acknowledged that the situation here did not "comport precisely" with the circumstances in *Aune*, but it asserted that the "effect" of the district court's January 18, 1985, order was to deny the Secretary's motion for relief from judgment. And because the Secretary had not appealed that order, the court of appeals refused to pass on the constitutionality of the intervening Act of Congress. *Id.* at 62a.

5. Following the court of appeals' order dismissing the Secretary's appeal, the Secretary took two further steps in an effort to achieve full judicial consideration of the constitutionality of the 1984 Act.

a. First, the Secretary filed a petition for rehearing of the court of appeals' order dismissing the appeal. In that petition, the Secretary explained that

he had not "abandoned" his appeal from the district court's March 26, 1984, order, since his position on appeal was that the court of appeals should approve the *less-than-universal* accounting provided for under the 1984 Act rather than the *universal* accounting ordered by the district court (Reh'g Pet. 9-12). The Secretary also explained that his failure to appeal the district court's January 18, 1985, order was irrelevant (i) because the district court had held (however erroneously under *Aune*) that it did not have jurisdiction to deny a Rule 60(b) motion by the Secretary, and (ii) because the court of appeals was in any event required to consider the intervening change in the law wrought by the 1984 Act (Reh'g Pet. 7-9, 10). The court of appeals nevertheless denied rehearing on June 19, 1987 (App. 73a-74a). The Solicitor General has authorized the filing of a petition for a writ of certiorari, currently due on September 17, 1987, seeking review of the court of appeals' order dismissing the Secretary's appeal.

b. Second, since the court of appeals had made clear that the district court, on its view, *would* have jurisdiction to entertain a motion for relief from judgment, the Secretary filed a new motion seeking relief from the district court's March 26, 1984, order. In this way, the Secretary sought to assure *some* avenue for appellate consideration of the constitutionality of the 1984 Act—if not in the Tenth Circuit, then by way of direct appeal to this Court. On April 10, 1987, the district court denied the Secretary's motion (App. 1a-5a). It stated (*id.* at 4a-5a):

> The Court has reviewed the motion and the objections thereto of the plaintiffs and again finds that the Secretary is not entitled to the relief

> sought. The Court not only has engaged once in the analysis required by *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), *see* Order of March 17, 1983, but also has already considered the legislative provisions cited by the Secretary and the need for protecting the due process rights of those beneficiaries for whom parents or spouses have been appointed representative payees. *See* Order of March 26, 1984, as amended July 2, 1984. Thus, the Court finds it unnecessary to readdress those arguments presented by the Secretary.

The instant direct appeal is taken from this order of the district court.

THE QUESTION IS SUBSTANTIAL

The district court has held an Act of Congress unconstitutional. That holding is clearly incorrect. The procedural protections afforded by the Social Security Disability Benefits Reform Act of 1984 and implementing regulations are more than adequate to protect the interests of the beneficiaries whose representative payees are excluded from the annual reporting requirement under that Act—principally, beneficiaries for whom the payee is a parent or spouse living in the same household. The Act and regulations provide for careful scrutiny in the selection of a representative payee in the first instance, require a parent or spouse who is a representative payee to verify periodically that he continues to live with the beneficiary, and authorize the Secretary to insist upon an accounting if he has reason to believe that funds are being misused by the payee. More fundamentally, a misapplication of funds by a properly designated representative payee is not a deprivation

of property by the United States Government for purposes of the Due Process Clause. That Clause therefore furnishes no support for the district court's requirement that all such payees account for their expenditures or for the district court's resulting invalidation of the exemptions from mandatory accounting under the 1984 Act.

The holding below is of broad practical importance. Because this case is a nationwide class action, the district court's judgment will require the representative payees for more than three million beneficiaries to make an annual accounting that Congress determined was both unnecessary and inappropriate. Review by this Court therefore is plainly warranted.

1. The district court erred in a number of respects in concluding that the Due Process Clause furnishes a basis for invalidating the exemptions to mandatory annual accounting contained in the 1984 Act.

a. In the district court's view, the possibility that some unspecified number of representative payees might misapply funds gives rise to a due process right on the part of *all* beneficiaries in representative-payee status to have their payees make an annual accounting of expenditures to the Secretary (App. 37a). Contrary to the district court's apparent belief, however, a misapplication of funds by a representative payee is not a "deprivation" of property by the United States for purposes of the Due Process Clause. The several million representative payees who receive payments under the Social Security programs are not government actors when they then spend those funds on behalf of the beneficiary. The payees are private individuals who have voluntarily assumed the responsibility of looking after the affairs of other private individuals. In fact, for most

of the appellee class members at issue here, the representative payee is the closest member of the beneficiary's family (his parent or spouse) and lives in the same household with him. An erroneous expenditure or a misuse of funds by such a person surely is not the action of the government. This principle is expressed in the Social Security Act and implementing regulations, which explicitly provide that the correct payment of benefits to a representative payee on behalf of the beneficiary is a "complete satisfaction" of any right or claim to the payment and "completely discharge[s]" the Secretary's obligation to the beneficiary. 42 U.S.C. 405(k); 20 C.F.R. 404.2041, 416.641.[6]

Moreover, as this Court recently reaffirmed, "a government 'normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government].'" *San Francisco Arts & Athletics* v. *U.S.O.C.*, No. 86-270 (June 25, 1987), slip op. 22-23, quoting *Blum* v. *Yaretsky*, 457 U.S. 991, 1004 (1982). There can be no plausible claim

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[6] The Tenth Circuit relied upon 42 U.S.C. 405(k) in an earlier decision in this case (App. 63a-72a), in which it rejected appellees' challenge to SSA's procedures for examining allegations of misuse of funds by a representative payee. The court of appeals recognized that such misuse might give rise to a state-law cause of action by the beneficiary against the payee or might prompt SSA to select a new payee. But it held that misuse would not give rise to any monetary claim against the Secretary that in turn would trigger a right to administrative or judicial review under 42 U.S.C. (& Supp. III) 405(b) and (g), since payment to the representative payee "discharges the Secretary from any further obligation" regarding the payment (App. 65a-66a, citing 42 U.S.C. 405(k)).

here that SSA provides "significant encouragement" or coercion to induce a representative payee to misspend funds. To the contrary, the Secretary has promulgated detailed guidelines to guard against such abuse. See 20 C.F.R. 404.2040, 416.640.

Nor is the Due Process Clause applicable merely because the government pays the funds, on the beneficiary's behalf, to his representative payee in the first instance. The government may pay monetary benefits to private parties "without assuming constitutional responsibility for their actions" (*San Francisco Arts & Athletics*, slip op. 20-21). See also *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 840-841 (1982); *Blum* v. *Yaretsky*, 457 U.S. at 1010-1011. Thus, for example, a parent's decision about how to spend Social Security benefits that have been paid to him for the benefit of his child "simply is not a governmental decision" (*San Francisco Arts & Athletics*, slip op. 23); see also *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)). For this reason, if a parent or other representative payee misapplies payments that he received from the government, the resulting loss of benefits is not a "deprivation" of property by the government for purposes of the Due Process Clause.

Because the conduct that the district court's universal accounting requirement is designed to forestall would not violate the Due Process Clause, the district court's judgment cannot be justified by reference to that Clause. The Constitution "does not require a remedy when there has been no 'deprivation' of a protected interest" (*Davidson* v. *Cannon*, No. 84-6479 (Jan. 21, 1986), slip op. 4).

b. Appellees likewise have no due process claim based on the actions that the government *does* take under the representative-payee program: the selec-

tion of the payee and the payment of benefits to that payee after his selection. The district court in fact rejected appellees' due process challenge to the procedures utilized by the Secretary in this respect, and appellees did not appeal that ruling (App. 26a-33a, 64a; see note 2, *supra*). Indeed, the procedures and standards applied by SSA demonstrate a special sensitivity to the care required in making those determinations. See pages 4-5, *supra*, and pages 22-23, *infra*. Those procedures and standards are especially unassailable as regards the class members at issue here—namely, beneficiaries whose representative payee is a parent or spouse living in the same household or is a federal or state residential institution. In all of those cases, the representative payee selected by the Secretary has custody of and a familial or legal relationship with the beneficiary, and therefore is especially likely to have an independent sense of responsibility for the beneficiary and his welfare.

For present purposes, then, it must be taken as a given that due process standards have been fully satisfied with respect to the Secretary's *selection* of representative payees for the class members at issue here. Nor is there any claim of a due process defect in the Secretary's procedures for *terminating* a representative payee's status when SSA is requested to do so or when it learns that the payee is not performing his responsibilities in the beneficiary's best interests.[7] Accordingly, at least in the absence of a request to terminate a representative payee or knowledge by SSA of derelictions by the payee that should lead it

---

[7] SSA in fact terminated the status of the representative payees for Jordan and Leeds when it was requested to do so by the beneficiary or a substitute payee. See page 6, *supra*.

to do so sua sponte, SSA's continued payment of benefits to a representative payee who was properly designated in the first place fully discharges the Secretary's obligations under the Due Process Clause as well as the Social Security Act. Cf. *United States* v. *Dann*, 470 U.S. 39, 48-49 (1985); *Seminole Nation* v. *United States*, 316 U.S. 286, 296 (1942).

This conclusion is compelled by *Daniels* v. *Williams*, No. 84-5872 (Jan. 21, 1986). There, the Court held that the Due Process Clause applies only to deliberate decisions by government officials to deprive a person of life, liberty, or property, and not to losses that result from a mere "lack of due care" by the government. Slip op. 4-6. Thus in the present context, even if the responsible SSA officials might fail in a given instance to exercise due care to discover or prevent an erroneous or improper expenditure by a representative payee, that failure would not constitute the sort of deliberate or abusive conduct by government officials to which the Due Process Clause is addressed. See also *Davidson* v. *Cannon*, slip op. 4. A fortiori, there is no basis in the Due Process Clause for the district court's imposition of a universal accounting requirement to prevent erroneous or improper expenditures by representative payees where a lack of due care on the part of SSA officials is neither alleged nor proven.[8]

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[8] Not only does the district court's mandatory accounting requirement lack support in law; it also lacks support in the record of the named plaintiffs in this case. SSA found no misuse of funds by the representative payee that had been appointed for either Jordan or Leeds. See page 6, *supra*. Moreover, SSA in fact requested an accounting of expenditures by the representative payees for Jordan and Leeds

c. Even if the Due Process Clause were thought to be implicated here, the procedures Congress and the Secretary have established are more than adequate to satisfy due process requirements. When Congress enacted the 1984 Act, it considered the precise question addressed by the district court: whether some or all representative payees should be required to make an annual accounting to the Secretary of their expenditures on behalf of the beneficiary. Congress concluded that an annual accounting should be required for some payees, but it specifically determined that "it is neither necessary nor appropriate to require governmental supervision or detailed accounting in the case of close familial relationships (parent and child or spouses living together) absent some allegation or overt reason to suspect the possibility of misuse of funds." S. Rep. 98-466, 98th Cong., 2d Sess. 29 (1984). Congress therefore expressly exempted parents and spouses living with the beneficiary from the annual accounting requirement.

Congress reasonably could determine that the close bond between these representative payees and the beneficiaries who live with them makes it especially unlikely that incidents of misuse will occur. In other words, Congress concluded that for this category, the "risk of an erroneous deprivation" (*Mathews*

(*ibid.*), and it is thus unclear how those named plaintiffs were in a position to challenge the Secretary's failure to require accountings in other circumstances. Finally, the representative payees about whom Jordan and Leeds complained would be required to submit an annual accounting under the 1984 Act, since neither was the parent or spouse of the beneficiary.

v. *Eldridge*, 424 U.S. 319, 335 (1976)) was very small, and that the "probable value" of the additional "procedural safeguard[]" (*ibid.*) of an annual accounting was correspondingly minimal. And Congress properly could determine that the uncertain advantage of annual accounting did not warrant the "fiscal and administrative burdens" (*ibid.*) that would be entailed by requiring millions of representative payees to file, and SSA to process, the paperwork that would necessarily ensue. Indeed, Congress in 1984 properly recognized the intrusive nature of a requirement that an individual account to the government for funds he received and spent on behalf of his spouse or child who lives under the same roof.

At the same time, Congress did not altogether excuse these parents and spouses from all reporting responsibility. Rather, to ensure that the familial and custodial bonds that justify the exemption continue to exist, Congress provided that spouses and parents must verify periodically that they still live in the same household with the beneficiary. 42 U.S.C. (Supp. III) 405(j)(3)(B), 1383(a)(2)(C)(ii). Such periodic verification is a fully adequate substitute for the annual financial accounting that is required of more distant relatives and other payees. Moreover, the Secretary has the authority under the 1984 Act to require an accounting from any representative payee, including one who is exempted from routine annual accounting, if he "has reason to believe" that the payee is "misusing" the payments. 42 U.S.C. (Supp. III) 405(j)(3)(E), 1383(a)(2)(C)(v). This authority furnishes an important additional check against possible abuse.

This Court "has been willing to assume a congressional solicitude for fair procedure" (*Califano* v. *Yamasaki*, 442 U.S. 682, 693 (1979)), and considerable deference therefore is due Congress's assessment of the need for particular procedural protections under a statutory benefits program. See *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 318-319 (1985); *Schweiker* v. *McClure*, 456 U.S. 188, 200 (1982). The district court failed to accord the requisite deference to Congress's judgment here.

2. The district court's April 10, 1987, order refusing to vacate the universal annual accounting requirement it previously imposed is of broad practical significance in the administration of the Social Security programs. The effect of that order will be to generate potentially burdensome and needless paperwork for the representative payees who have been selected to receive and spend funds on behalf of more than three million beneficiaries. The order also imposes a substantial and unwarranted administrative burden on the Social Security Administration, which would be required to receive, process, and investigate millions of additional forms each year. Perhaps Congress in the future will conclude, on the basis of SSA's experience under the far more limited accounting program established by the 1984 Act, that accounting should be required of some additional representative payees. But the district court clearly erred in holding that the Due Process Clause inflexibly mandates the universal accounting enjoined by its April 10, 1987 order.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

JEANNE A. JORDAN, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

JEANNE A. JORDAN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

CONSOLIDATED APPENDIX

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-79-994-W

JEANNE A. JORDAN, ET AL., PLAINTIFFS

vs.

OTIS T. BOWEN, M.D., Secretary
of Health and Human Services, DEFENDANT

[Filed Apr. 10, 1987]

ORDER

This action was initiated by the plaintiffs on September 7, 1979, to challenge the Social Security Administration's (SSA) failure to monitor individuals who act as representative payees for the receipt and disbursement of Social Security and Supplemental Security Income benefits. The plaintiffs brought various claims including a claim under the due process clause of the fifth amendment. They contended that the SSA had violated their due process rights by failing to implement an accounting system by which to determine if representative payees were carrying out their statutory duty to spend the benefits received solely for the use of the plaintiff-beneficiaries.

On March 17, 1983, this Court issued its Order rejecting the position of the defendant, Richard S. Schweiker, then Secretary of Health and Human Services (the Secretary), that the SSA had no obligation to monitor the expenditures of benefits by representative payees. *Jordan v. Schweiker*, No. CIV-79-994-W, slip op. at 17 (W.D. Okla. March 17, 1983). The Court found that "the discretionary accounting procedures . . . in effect [did] not provide due process to the social security beneficiaries for whom representative payees [had] been appointed." *Id.* The Secretary was directed to institute a mandatory periodic accounting system within one year. *Id.*

In an attempt to comply with the Court's Order of March 17, 1983, the Secretary took a random survey of only ten percent (10%) of all payees. Such action prompted the plaintiffs to file a Motion for Order Enforcing Judgment.

On March 26, 1984, the Court in ruling on the motion found that the due process rights of the plaintiff could only be protected by universal annual accountings and directed the Secertary to take "immediate steps" to implement such a system. *Jordan v. Schweiker*, No. CIV-79-994-W, slip op. at 3 (W.D. Okla. March 26, 1984). Upon subsequent motion by the Secretary, then Margaret Heckler, the Court amended its Order of March 26, 1984, to allow the SSA to monitor state institutional payees through its on-site review programs. *Jordan v. Heckler*, No. CIV-79-994-W (W.D. Okla. July 2, 1984).

On August 29, 1984, the Secretary filed a notice of appeal with the United States Court of Appeals for the Tenth Circuit from this Court's Order of March 26, 1984, as amended, July 2, 1984. Thereafter on October 16, 1984, the Secretary filed with

this Court a Motion for Indicative Ruling and Relief from Judgment under Rule 60(b)(6), F.R. Civ.P.

In the motion, the Secretary argued that recent legislation had been enacted which was contrary to this Court's Order requiring mandatory accounting of all representative payees. The legislation, the Social Security Disability Reform Act of 1984, Section 16, Pub. L. No. 98-460 (effective October 9, 1984), created a mandatory accounting system but exempted from such system the parents and spouses serving as representative payees for beneficiaries in their custody.

On January 18, 1985, the Court acknowledged that it was without jurisdiction to grant the motion but advised the parties if such a motion under Rule 60 (b) were considered by the Court it would deny the relief requested. The Court stated in part:

> "While the Court is well aware of the deference usually given Congressional actions, the fact that Congress has enacted some reforms does not change the constitutional requirements. The only way by which the Secretary can avoid the mandatory annual accounting is to establish that beneficiaries' due process rights are being adequately provided through some alternative means . . . [N]o such showing has been made for either of the two categories [spousal/parental payees and federal institutions] set out above. Beneficiaries in these two categories have the same rights under the due process clause as do all other beneficiaries for whom representative payees have been appointed."

Jordan v. Heckler, No. CIV-79-994-W, slip op. at 6-7 (W.D. Okla. January 18, 1985).

On January 5, 1987, the United States Court of Appeals for the Tenth Circuit found that the Secretary, then Otis R. Bowen, M.D., had abandoned the earlier appeal filed August 29, 1984, wherein this Court's Order of March 26, 1984, as amended, July 2, 1984, had been challenged and further that the Secretary had failed to file a timely notice of appeal from this Court's Order of January 18, 1985. *Jordan v. Bowen*, 808 F.2d 733, 736 (10th Cir. 1984). The appellate court dismissed the appeal without addressing the correctness of the latter Order. Now pending before the appellate court is a Petition for Rehearing and Suggestion for Rehearing En Banc and a Motion in the Alternative for Stay of Action on Rehearing Petition.

The matter now comes before this Court on the Secretary's Motion for Relief of Judgment filed pursuant to Rule 60(b)(6) wherein the Court is asked to vacate its Orders of March 17, 1983, and March 26, 1984, as amended, July 2, 1984. The plaintiffs have responded in opposition to the motion and again the parties have acknowledged that this Court is without jurisdiction to grant the instant motion. *E.g.*, *Aune v. Reynders*, 344 F.2d 835, 841 (10th Cir. 1965). The Court can either deny the motion or, if it concludes that the motion has merit, should so advise the parties who can then request the appellate court to remand the matter so that this Court can act. *Id.*

The Court has reviewed the motion and the objections thereto of the plaintiffs and again finds that the Secretary is not entitled to the relief sought. The Court not only has engaged once in the analysis required by *Mathews v. Eldridge*, 424 U.S. 319 (1976), *see* Order of March 17, 1983, but also has

already considered the legislative provisions cited by the Secretary and the need for protecting the due process rights of those beneficiaries for whom parents or spouses have been appointed representative payees. *See* Order of March 26, 1984, as amended July 2, 1984. Thus, the Court finds it unnecessary to readdress those arguments presented by the Secretary. Accordingly, the Secretary's instant Motion for Relief of Judgment should be and is hereby DENIED.

ENTERED this 10th day of April, 1987.

/s/ Lee R. West
LEE R. WEST
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CIV 79-994-W

JEANNE A. JORDAN, ET AL., PLAINTIFFS

-vs-

OTIS T. BOWEN, M.D., Secretary
of Health and Human Services, DEFENDANT

[Filed May 8, 1987]

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that the defendant, Otis T. Bowen, M.D., Secretary of the Department of Health and Human Services, hereby appeals to the Supreme Court of the United States from the final Order entered in this action on April 10, 1987.

This appeal is taken pursuant to 28 U.S.C. § 1252 and 28 U.S.C. § 2101.

Dated this 8th day of May 1987.

Respectfully submitted,

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United States Attorney
Western District of Oklahoma

/s/ Roger Griffith
ROGER GRIFFITH
Assistant U.S. Attorney

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CIV-79-994-W

JEANNE A. JORDAN, individually and on behalf of all other persons similarly situated, PLAINTIFF

vs.

PATRICIA R. HARRIS, individually and in her official capacity as Secretary of Health and Human Services, DEFENDANT

[Filed Sep. 26, 1980]

ORDER

Background

This cause is before the Court on defendant's Motion to Dismiss for lack of jurisdiction or in the alternative to Deny Class Certification.

The plaintiff, Jeanne A. Jordan, became entitled to disability benefits under Title II of the Social Security Act in December, 1976. Although legally competent, it was determined that she was not capable of managing her benefits. Her sister, Cathy J. Culp, was therefore, designated as representative payee for Ms.

Jordan, pursuant to the Social Security Administration's procedures under § 205(j) of the Social Security Act, 42 U.S.C. § 405(j), in which the Secretary may designate a representative payee to whom the payment of benefits is made on behalf of a beneficiary.[1]

In October, 1977, upon a determination that she was no longer disabled, Ms. Jordan's benefits were terminated. As a result, Ms. Jordan alleges Ms. Culp forced her to leave her home and ceased in any way to act on Ms. Jordan's behalf. (Plaintiff's Complaint ¶¶ 23 and 24). Ms. Jordan administratively appealed the termination of her benefits and, after ten months, an administrative law judge reinstated her benefit status, effective from October 1977. However, the notice of her reinstatement, dated September 9, 1978, and the check for her past-due benefits which had accrued during the pendency of her appeal were sent to Ms. Culp, even though, plaintiff alleges, neither she nor her counsel was informed that Ms. Culp would be the payee. Plaintiff further alleges that at that time the whereabouts of the former payee were unknown to plaintiff and her attorney and that she had not even seen the payee for over one year.

On September 29, 1978, Ms. Jordan's husband, Michael A. Jordan, applied to be his wife's representative payee. On November 13, 1978, Ms. Jordan's

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[1] Title 42 § 405(j) reads:

> When it appears to the Secretary that the interest of an applicant entitled to a payment would be served thereby, certification of payment may be made, regardless of the legal competency or incompetency of the individual entitled thereto, either for direct payment to such applicant, or for his use and benefit to a relative or some other person.

attorney wrote the first in a series of letters requesting that the Social Security Administration reimburse Ms. Jordan for the past-due benefit check and another monthly benefit check which Ms. Jordan did not receive.

Ms. Jordan alleges that her plight was aggravated when the Secretary immediately disclaimed any further responsibility for the paid-out benefits on being informed that they had been missent. She contends that it was a year later before the Social Security Administrator communicated retrieval-of-check information to her attorney. Plaintiff alleges that there is no rehabilitative procedure applicable to her case.

Finally, plaintiff alleges that the defendant, solely for administrative convenience, has suspended the requirement that the representative payees, whom the defendant had designated, make an annual accounting of the funds received. Thus, she seeks in addition, mandatory annual accountings by payees.

Statement of Issues

Unsatisfied with the results of her attorney's correspondence with the Social Security Administration regarding her representative payee, on September 7, 1979, Ms. Jordan, as a recipient of disability-insurance benefits under Title II of the Social Security Act and in "representative payment" status, filed this civil action on behalf of herself and all others similarly situated. She alleges, *inter alia*, that the Social Security Administration's procedures pursuant to § 205(j) of the Social Security Act, 42 U.S.C. § 405(j) and the corresponding regulations 20 C.F.R. §§ 404.1601, 404.1602, 404.1609, for the representative payment of Social Security benefits, deny her and the alleged class due process of law

under the Fifth Amendment to the Constitution of the United States. In support of this allegation, she contends that the defendant Secretary of Health and Human Services has proceeded under § 205(j) of the Social Security Act to name representative payees to receive the beneficiaries' payments without any semblance of due process as to notice and hearing whereby the beneficiaries are unable to prescribe or even nominate whom the payee should be.

Accordingly, the plaintiff asks this court to take jurisdiction pursuant to 42 U.S.C. § 405(g) or 28 U.S.C. § 1361, to certify this section as a class action pursuant to Rule 23(c)(1), to declare § 405(j) and its implementing regulation unconstitutional; to enjoin the Secretary from further enforcement of § 405 (j); and to order the promulgation of new regulations.

On February 12, 1980, as a result of negotiations aimed at settling this civil action, a check in the amount of $2,356.90 was sent to Ms. Jordan as payment of benefits for the period from November 1977 through October, 1978. Ms. Jordan has refused to withdraw this law suit, however, contending that this payment has no bearing on the issues in this case.

In response to plaintiff's allegations and requests for relief, the defendant has made Motion to Dismiss and in the alternative, Motion to Deny class certification, asserting that even if plaintiff has a claim arising under the Constitution that such constitutional question must first be resolved through exhaustion of administrative remedies as dictated by 42 U.S.C. § 405(j). Defendant, in support of its motion to deny class certification, states that its action to restore payments wrongfully made to plaintiff's representative payee and subsequent actions to name an-

other representtive payee deprive plaintiff of the status of being representative of the class.

Jurisdiction

The Secretary of Health and Human Services, the defendant herein, submits that this Court lacks jurisdiction grounded on Title 28 U.S.C. § 1361, the federal mandamus statute, and contends further that subject-matter jurisdiction for judicial review of matters arising under Title II of the Social Security Act is exclusively limited to section 205(g) of the Act, 42 U.S.C. § 405(g)[2] and the limitation set forth in section 205(b) of the Act, 42 U.S.C. § 405(h).[3]

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[2] Section 405(g) provides, in pertinent part:

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia.

[3] Section 405(h) reads:

> The findings and decision of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 1331 or 1346 of Title 28 to recover on any claim arising under this subchapter.

The Secretary argues that review is not available to plaintiffs because they have not satisfied the jurisdictional prerequisites to review under § 405(g), to wit, exhaustion of remedies and receipt of a final decision.

Plaintiff, on the other hand, contends that this case is not concerned with establishing an entitlement or claim for Social Security benefits, but with a constitutional right to due process regarding a claim or entitlement that is already an established property right. Therefore, plaintiff contends exhaustion of remedies is not required. She further argues that she has met the "final decision" requirement under § 405 (g) (h) and that in any case, because her claim is a constitutional challenge, jurisdiction under Title 28 U.S.C. § 1361 is also proper.

In view of the recent decision of *Califano v. Yemaski*, —— U.S. ——, 99 S.Ct. 2545, 2553 1979, in which the Court commented on the District Courts' and the Court of Appeals' "somewhat short shrift" in failing to give due consideration to the statutory remedy in preference to "unnecessary constitutional adjudication", and in view of the holding in *Weinberger v. Salfi*, 422 U.S. 749, 95 S.Ct. 2457, 2465 (1975), that in some cases, "the Social Security Act provides jurisdiction for constitutional challenges to its provisions", this Court will analyze the statutory provisions first to determine if they are a basis for jurisdiction in this case.

Analysis of 28 U.S.C. § 405(g) as Jurisdictional Basis

Based on our interpretation of Justice Rehnquist's opinion in *Weinberger v. Salfi, supra*, and its progeny, this Court believes that the limitations the Sec-

retary attributes to 42 U.S.C. § 405(g) are not controlling in the case at bar. In *Salfi* the Court held:

> "§ 405(h) . . . extends to any "action" seeking to recover on any Social Security claim."

422 U.S. 762, 95 S.Ct. 2465.

As plaintiff has assiduously argued, however, there is no controversy here about whether the plaintiffs are entitled to recover on a Social Security claim. Thus, while *Salfi* focused on trying to recover on a Social Security claim by *establishing an entitlement*, and *Mathews v. Eldridge*, 424 U.S. 319, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976), on trying to recover Social Security claims that were being *terminated*, in the case at bar there is no issue as to any claim of entitlement arising under 42 U.S.C. § 405(g). Plaintiffs have been determined as entitled and thus they have "property" interests constitutionally protected. For the Court in *Mathews v. Eldridge* held:

> "[3] Procedural due process imposes constraints on governmental decision which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. The Secretary does not contend that procedural due process is inapplicable to terminations of Social Security disability benefits. He recognizes, *as has been implicit in our prior decisions*, e.g., *Richardson v. Belcher*, 404 U.S. 78, 80-81, 92 S.Ct. 254, 256-257, 30 L.Ed.2d 231 (1971); *Richardson v. Perales*, 402 U.S. 389, 401-402, 91 S.Ct. 1420, 1427-1428, 28 L.Ed.2d 842 (1971); *Flemming v. Nestor*, 363 U.S. 603, 611, 80 S.Ct. 1367, 1372-1373, 4 L.Ed.2d 1435

> (1960), *that the interest of an individual in continued reecipt of these benefits is a statutorily created "property" interest protected by the Fifth Amendment.*" (emphasis added)

Id. at 424 U.S. 332, 333, 96 S.Ct. 901-902.

Thus, what we have at issue is, in our opinion, a purely constitutional question, a matter collateral to an entitlement a challenge to a procedure that allows the Secretary to (1) make an ex parte appointment of another to receive the benefits without so much as a by-your-leave from the recipients, and (2) a procedure that does not require the payee to give an annual accounting of the benefits that he has received on behalf of the recipient.

Despite this collateral constitutional claim, however, plaintiff argues that this court has jurisdiction under § 405(g). We do not think so. In both *Salfi* and *Eldridge, supra,* and in subsequent comments on those cases in *Califano v. Sanders,* 430 U.S. 99, 97 S.Ct. 908 (1977), the Court discussed that requisite of a "final decision" from the Secretary before invoking 405(g) jurisdiction. 430 U.S. 108-109, 97 S.Ct. 986.

The plaintiff, however, citing *Mathews v. Eldridge, supra,* argues that she has met the "final decision" requisite. *Eldridge* holds that the "final decision" is the Secretary's response to Eldridge's claim of protest to the Secretary when he was notified that his current status as a recipient was to be terminated. 422 U.S. 328-329, 96 S.Ct. 899-900. The Court said:

> "*Salfi* identfiied several conditions which must be satisfied in order to obtain judicial review under § 405(g). Of these, *the requirement* that there be a *final decision by the Secretary after*

a hearing was regarded as "*central to the requisite* grant of *subject-matter jurisdiction* . . . ." 422 U.S., at 764, 95 S.Ct. at 2466. Implicit in *Salfi*, however, is the principle that this condition consists of two elements, only one of which is purely "jurisdictional" in the sense that it cannot be "waived" by the Secretary in a particular case. The waivable element is the requirement that the administrative remedies prescribed by the Secretary be exhausted. The nonwaivable element is the *requirement that a claim for benefits shall have been presented to the Secretary.* Absent such a claim there can be no "decision" of any type. And some decision by the Secretary is clearly required by the statute.

* * * *

Eldridge has fulfilled this crucial prerequisite. Through his answers to the state agency questionnaire, and his letter in response to the tentative determination that his disability has ceased, *he specifically presented the claim that his benefits should not be terminated because he was still disabled.* This claim was denied by the *state agency* and *its decision* was accepted by the SSA." (emphasis added)

Furthermore, the *Salfi* Court says that notwithstanding a constitutional challenge, judicial review under § 405(g)(h) requires: (1) a final decision of the Secretary made after a hearing, (2) commencement of a civil action within 60 days after the mailing of notice of such a decision, and (3) filing of the action in an appropriate district court, with only the first requirement being "central to the requisite grant of subject-matter jurisdiction." *Id.* at 422 U.S. 763-764, 95 S.Ct. 2466.

While it is true that plaintiffs' constitutional claim in *Salfi* was only "colorable", in which plaintiffs were trying to establish entitlement to social security benefits and in this case entitlement is already established, under 405(g) it appears that a "final decision" on the controversy at issue is nonetheless required, and this Court does not believe that plaintiff has met this "final decision" requirement.

Plaintiff, we think, misconstrues the term "final decision" by arguing that her claims for social security benefits and her being adjudged a qualified recipient is a "final decision" in regard to this case. While it is true that plaintiff's being declared a qualified recipient is a "final decision" by the Secretary, *that* "final decision" has no bearing on *this* controversy. Here, we think, "final decision" would have been plaintiff's protesting administratively the procedures for the Secretary's selection of a "representtaive payee," and the Secretary's decision to this response.

Therefore, we hold that this Court does not have jurisdiction under 42 U.S.C. § 402(g), but we further hold that 42 U.S.C. § 402(g) is not intended to control in this case, or if it does, it is unconstitutional and, *a fortiori*, not applicable. While Congress may, by statute, vest constitutional rights. Once vested such rights cannot be proscribed by substitute mandatory administrative procedures in place of constitutional remedies. Congress and the agencies which it creates simply lack the power to make administrative regulations superior to rights arising under the Constitution. Courts are created to decide those rights.

Furthermore, dicta in *Califano v. Sanders, supra*, says the following regarding constitutional claims:

> "Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions. . . . [W]hen constitutional questions are in issue, the availability of judicial review is presumed, and we will not read a statutory scheme to take the "extraordinary" step of foreclosing jurisdiction unless Congress' intent to do so is manifested by 'clear and convincing' evidence. 422 U.S. at 762, 95 S.Ct., at 2465; *Johnson v. Robinson*, 415 U.S. 361, 366-67, 94 S.Ct. 1160, 1165-66, 39 L.Ed.2d 389 (1974)."

430 U.S. 108, 97 S.Ct. 986.

Analysis of Title 28 U.S.C. § 1361
As Basis for Jurisdiction

This Court now examines the mandamus statute to determine if it has jurisdiction under Title 28 U.S.C. § 1361. This statute reads *in toto*:

> "§ 1361. Action to compel an officer of the United States to perform his duty
>
> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

This statute has traditionally been used to compel compliance with due process requirements and to provide jurisdiction "to declare the due process requirements applicable to [the challenge] proceedings." *Elliott v. Weinberger*, 564 F.2d 1219, 1226 (9th Cir. 1977). See also, *Ryan v. Shea*, 525 F.2d

268, 271-272 (10th Cir. 1975); *Knuckles v. Weinberger*, 511 F.2d 1221 (9th Cir. 1975).

In *Ryan v. Shea, supra*, the Tenth Circuit said of *Salfi* and 28 U.S.C. § 1361:

> ". . . In the instant case we are not concerned with the denial of a claim as such, but with the determination by the Secretary to terminate disability benefits in an allegedly unconstitutional manner, i.e., without notice and hearing. ". . . In sum, *Salfi* does not apply and 42 U.S.C. § 405(g) is certainly not in our view the exclusive way to tackle the precise problem here sought to be raised.
>
> "We therefore conclude that the trial court had jurisdiction to entertain the present proceeding under 28 U.S.C. § 1361."

Id. at 272.

Regarding the mandamus statute, the Ninth Circuit in *Elliott v. Weinberger*, 564 F.2d 1219, 1227 (1977), commented:

> "[No] clear and convincing evidence exist[s] that Congress intended to limit mandamus jurisdiction at all by § 405(h). Section 1361 did not exist when § 405(h) was enacted in 1935 precluding jurisdiction under section 41 of Title 28 for recovery of Social Security claims. In at least one other instance where Congress intended a statutory limitation to encompass § 1361, a specific amendment to the limiting statute was made."

The Court further comments at 1227, note 12:

> "When § 405(h) was enacted in 1935, section 41 of Title 28 contained all of that title's grants

of jurisdiction to district courts, including § 1331's predecessor. *See*, 28 U.S.C. § 41(1) (1940). It did not contain any grant to federal courts to entertain actions in the nature of mandamus. It was not until 1962 when Congress, in enacting § 1361, extended to all federal courts jurisdiction to hear suits seeking mandamus relief—such jurisdiction prior thereto reposed only in the federal courts of the District of Columbia. Thus, § 1361 actions cannot be considered precluded under § 405(h) simply because § 1361 did not exist when § 405(h) was enacted. One might argue that Congress intended all further additions to Title 28's grants of jurisdiction to be, by the mere statutory location of those additions, subsumed within the proscription of § 405(h). However, no such congressional intent is anywhere evidenced."

Therefore, the Court holds under the above authority that 28 U.S.C. § 1361 is the jurisdictional basis for its hearing this case in which recipients of Social Security benefits (1) challenge the Secretary's appointment of representative payees to receive their Social Security benefits without giving them adequate notice and a meaningful opportunity for a prior hearing on the initial selection of an individual as a representative payee (or continuation of an individual as a representative payee when a beneficiary's benefits have been interrupted), and (2) seek to enforce what they claim is a constitutional right to a mandatory and annual accounting by payees.

Class Certification

Pursuant to the Federal Rules of Civil Procedure, Rule 23(c)(1), (a), and (b)(2) and *Rex v. Owens*

ex rel. State of Oklahoma, 585 F.2d 432, 435 (10th Cir. 1978), this Court certifies Jeanne A. Jordan, as representative of the class, and as a class all recipients and Social Security benefits (Title II of the Social Security Act, as amended) and Supplemental Security Income (Title XVI of the Act) who now have or have had a representative payee within six years prior to the filing of this action. The class does not include the following persons:

(1) Those who are named plaintiff or are members of a plaintiff class in pending actions against the Secretary which raise similar issues in other districts.

(2) Those who have participated as plaintiffs or members of a plaintiff class in litigation against the Secretary on similar issues, if a decision on the merits has been rendered.

Inasmuch as we hold that this Court's jurisdiction is grounded on Title 28 U.S.C. § 1361 and not on 42 U.S.C.§ 405(g), this Court need not consider the objections the Secretary raises under § 405(g).

Regarding the Secretary's allegation that the claim of the named plaintiff is not typical of the claims alleged on behalf of the class, we disagree. All qualified recipients of Social Security benefits which Ms. Jordan wants to include in the class, can claim the same deprivation of constitutional rights alleged by Ms. Jordan: (1) denial of due process caused by the lack of provision for prior hearings in the selection process of a representative payee, (2) denial of due process from a lack of hearing in the event of interruption and reinstatement of benefits before automatically continuing the representative payee in that status, and (3) denial of due process because of the

lack of a mandatory annual accounting requirement in the representative payment program.

Thus, we do not see that the legal competence or incompetence of a Social Security beneficiary is controlling inasmuch as a recipient, even if incompetent, still has constitutional rights, and the same is true of minors and institutionalized people. *Vecchione v. Wohlgemath*, 377 F.Supp. 1361, *aff'd*, 558 F.2d 150, *cert denied, Beal v. Vecchione*, 434 U.S. 943, 98 S.Ct. 439, 54 L.Ed.2d 304 (1974).

Finally, this Court does not agree that because the Secretary has, after months have passed, made restitution to Ms. Jordan, that as to her the case is moot. That argument belies the obvious; that is, that Ms. Jordan is still subject to the same alleged malfeasance. Restitution in no way reduced the risk of further injury since the same procedures that allowed the first injury are still in full force and effect. *See, Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed. 310 (1911), for the principle that the case will not be moot if the issue is capable of repetition, yet evading review. This principle was followed in *Rex v. Owens, supra.*

WHEREOF, defendant's Motions to Dismiss and to Deny Class Certification are denied. This Court takes jurisdiction and certifies this case as a class-action suit.

IT IS SO ORDERED this 25th day of September, 1980.

/s/ Lee R. West
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

CIV-79-994-W

JEANNE A. JORDAN, ET AL., PLAINTIFFS

vs.

RICHARD S. SCHWEIKER, Secretary of Health and Human Services, DEFENDANTS

[Filed Mar. 17, 1983]

ORDER

This matter comes before the Court upon the Motion for Summary Judgment, or Alternatively, to Dismiss of the defendant and the Cross-Motion for Summary Judgment of the plaintiffs. Defendant filed a Reply Brief and plaintiffs filed a Supplemental Memorandum in Support of Cross-Motion for Summary Judgment. Oral argument on these cross-motions was held March 2, 1983.

Plaintiff Jeanne A. Jordan became entitled to disability insurance benefits under Title II of the Social Security Act in December 1976. Although legally competent, it was determined that she was not capable of managing her benefits. Her sister, Cathy J. Culp,

was therefore designated as representative payee for Ms. Jordan.

In October 1977, upon a determination that she was no longer disabled, Ms. Jordan's disability benefits were terminated. As a result, Ms. Jordan alleges, Ms. Culp forced her to leave her home and ceased in any way to act on Ms. Jordan's behalf. Ms. Jordan administratively appealed the termination of her benefits and after a hearing before an administrative law judge her benefit status was reinstated effective from October 1977. However, the notice of her reinstatement, dated September 9, 1978, and the check for her past-due benefits which had accrued during the pendency of her appeal, were sent to Ms. Culp.

On September 29, 1978, Ms. Jordan's husband, Michael A. Jordan, applied to be her representative payee. On November 13, 1978, Mr. Jordan was designated as representative payee for his wife and began receiving monthly benefits on her behalf.

Plaintiff filed her Complaint on September 7, 1979. On February 12, 1980, a check in the amount of $2,356.90 was sent to Ms. Jordan as payment of benefits for the period from November 1977 through October 1978.

On September 26, 1980, this Court took jurisdiction and certified this case as a class-action suit. On April 5, 1982, this Court granted plaintiffs' Motion to Intervene Barbara Leeds.

Maude Miller, on February 11, 1977, was recommended by the Social Security Administration (SSA) to be made representative payee on behalf of Barbara Leeds. Barbara Leeds agreed to the appointment of Maude Miller as her representative payee. However, on April 27, 1977, Barbara Leeds requested that payments be made directly to herself.

On June 6, 1977, Maude Miller was directed to make an accounting of how benefits received on behalf of Barbara Leeds from June 1974 through May 1977 were used. On December 27, 1978, Barbara Leeds alleged misuse of funds by Maude Miller. SSA found no misuse. Barbara Leeds requested a reconsideration of this finding. On January 10, 1980, SSA found, after a review of the case that its "previous decision, that misuse is not an issue, was correct."

Defendant contends that procedures for the representative payment of social security benefits do not violate a beneficiary's right to due process of law; that due process does not require mandatory periodic accounting by representative payees; and that this case should be dismissed for lack of jurisdiction.

Plaintiff contends that under either 42 U.S.C. § 405 (j) or the Due Process Clause of the Fifth Amendment the Secretary of Health and Human Services is required to provide the opportunity for an oral hearing prior to the initial selection or continuation of a payee; that mandatory periodic accountings are required by the provisions of the Social Security Act allowing for representative payment and due process; and that full administrative and judicial review of claims of misuse is required by the Due Process Clause and by statute.

On a motion for summary judgment, this Court must construe the facts in a way most favorable to the nonmovant. *United States v. Diebold, Inc.*, 369 U.S. 654 (1962). Cross-motions for summary judgment are to be treated separately; the denial of one does not require the grant of another. *See S.E.C. v. American Commodity Exchange, Inc.*, 545 F.2d 1361 (10th Cir. 1976). The existence of any "genuine issue as to any material fact precludes the grant of

summary judgment." Rule 56, Fed.R.Civ.P. This Court does not find that any genuine issue of material fact exists, therefore summary judgment is appropriate.

Jurisdiction

Defendant contends that this case should be dismissed for lack of jurisdiction. In its Order of September 26, 1980, this Court dealt with defendant's claim of lack of jurisdiction and found that this Court has jurisdiction under 28 U.S.C. § 1361. Accordingly, defendant's Motion for Summary Judgment based upon its claim of lack of jurisdiction should be and is hereby DENIED.

Oral Hearing Prior to the Initial Selection or Continuation of a Payee

The defendant states that the Secretary's authority to appoint a representative payee for social security benefits is set forth in section 405(j) of the Social Security Act, 42 U.S.C. § 405(j). The Secretary has implemented the mandate of section 405(j) through 20 C.F.R. §§ 404.1601-1610 and §§ 416.601-690 and Part 02 of the Social Security Administration's Program Operation Manual System.

Under these procedures, prior to a determination that a beneficiary is in need of a representative payee and prior to the selection of a payee, the SSA provides all adult beneficiaries who have not been adjudged legally incompetent with advance notice of the proposed determinations. POMS GN 00502.240. The advance notice provides the beneficiary with the opportunity to object to the proposed determinations before they are formalized and to submit additional information. The advance notice states that if no notice protest is received within ten days, the pro-

posed action will be processed. POMS GN 00502.-300B.

If a beneficiary protests the proposed determination, considerable weight is given to the protest. In such cases, direct payment continues unless convincing evidence clearly establishes that the beneficiary is not able to handle his or her own funds. POMS GN 00502.260. Where no protest is received, or there is sufficient evidence to appoint a representative payee in spite of a protest, the payee is processed and the beneficiary is sent a formal notice of the determination which provides information regarding his or her right to appeal. POMS GN 00504.285A. Thus, for an adult beneficiary not adjudged legally incompetent, there is advance notice of both the determination of need for representative payee status and the determination of who the representative payee will be. Both the "need" and the "who" determinations are "initial" determinations subject to full administrative appeal and judicial review. 20 C.F.R. § 404.905(n).

For adult beneficiaries who have been adjudged legally incompetent the procedures are slightly different. In such cases the determination regarding the "need" to appoint a representative payee is not an initial determination and is, therefore, not subject to the administrative appeal process. The determination regarding "who" will be appointed representative payee is, however, an initial determination and is, therefore, subject to full advance notice and post-determination appeal procedures. 20 C.F.R. § 404.905(n). Where the legal representative of the adjudged incompetent beneficiary is not the proposed payee, an advance notice of proposed payee selection is provided the legal representative. The advance notice gives the legal representative an opportunity

to object to the proposed payee selection before it is formalized and to submit additional information. The advance notice states that if no protest is received within ten days, the proposed action will be processed. POMS GN 00502.245, 00502.300C. Where no protest is received, or where there is sufficient evidence to appoint a particular payee in spite of a protest, the payee action is processed and the legal guardian is sent a formal notice of the determination which provides information regarding the right to appeal the determination. POMS GN 00504.285B.

The defendant claims that the SSA goes to great length to find a representative payee who is genuinely interested in the welfare of the beneficiary. POMS GN 00502. The relationship of the potential payee with the beneficiary is evaluated. Preference is given to a legal guardian, spouse, relative, friend or lastly an institution. POMS GN 00502.130.

The defendant contends that in order to monitor the impact of these procedures SSA listed all initial and post-entitlement rep payee determinations between January 1977 and June 1979. Of over 52,000 rep payee determinations on initial claims, less than 2% of the beneficiaries protested the proposed determination. Of those protests, SSA's determination was split evenly in sustaining the protest or making the determination in spite of the protest. In over 287,000 post-entitlement rep payee determinations only 4.4% of the affected beneficiaries protested. SSA's determinations upon protest were evenly split with a 2.3% of the protests honored and 2.1% of the proposed determinations made in spite of the protest.

Defendant further contends that requiring a hearing before the selection of a rep payee would create a hardship for the beneficiary. Pursuant to 20 C.F.R.

404.95(n) the rep payee selection determination is an "initial determination" subject to the Secretary's four-step administrative appeal and ultimate judicial review pursuant to 405(g) of the Act, 42 U.S.C. 405(g). Defendant contends that it is more sensible for SSA to certify payment of benefits to its choice as payee rather than to have certification of payment of benefits delayed awaiting the outcome of an adversary hearing to settle a dispute over a rep payee selection.

Defendant, therefore, contends that neither the Social Security Act nor the Due Process Clause of the Fifth Amendment requires the opportunity for an oral hearing prior to the selection of a representative payee.

Plaintiffs contend that the Secretary's policy of limiting an "incapable" beneficiary to written objections does not adequately protect the beneficiary from appointment of an incompetent or untrustworthy payee absent a prior hearing. Plaintiffs further contend that in evaluating a payee-applicant's "concern for a beneficiary's best interest" the Secretary must assess the state of mind hence, credibility) of the payee-applicant which requires an oral "face-to-face" meeting. Therefore, plaintiffs contend that both 42 U.S.C. § 405(j) and the Due Process Clause of the Fifth Amendment require that the Secretary provide adequate notice and a meaningful opportunity for a prior hearing concerning the initial selection or continuation of an individual as payee.

The United States Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319, 335, stated that

> identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that

> will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

This Court concludes that application of the factors in *Mathews v. Eldridge* to the facts in this case is necessary.

This Court agrees with plaintiffs that the private interest of beneficiaries in the receipt and proper use of social security benefits is substantial.

This Court does not agree with plaintiffs' contentions that the risk of error under the Secretary's procedures is great and the value of an oral hearing prior to selection or continuation of a payee is substantial. In *Tidwell, et al. v. Califano, et al.*, Nos. 73-C-3014 and 74-C-183 (N.D. Ill., March 5, 1979), plaintiffs filed suit on behalf of all individuals who had been or were at that time patients in Illinois state mental hospitals. The panel addressed the issues of whether or not "due process requires an initial determination at the Incompetency Need Stage and whether due process requires more than the 'panoply of administrative and judicial review rights' which are provided by the initial determination where it is required." The *Tidwell* court initially found the Secretary's old (prior to 1976) representative payee procedures were in violation of the Fifth Amendment and so ruled. *Tidwell, et al. v. Weinberger*, Nos. 73-C-3014 and 74-C-183 (N.D. Ill., June 23, 1976). Subsequently, the Secretary's current pro-

cedures were implemented and considered by the *Tidwell* court which stated at p. 8-9:

> In our Order we indicated that *Mathews v. Eldridge*, 424 U.S. 319 (1976), addresses the issue of whether procedures prior to and during the selection of a representative payee meet due process standards. In weighing the different factors then under consideration and juxtaposing our findings against the *Eldridge* criteria, we held that "the administrative procedures in the present case obviously lack any procedural safeguards." (Order, p. 17). We also found, however, that, although need stage hearings would provide the greatest safeguards, they were not constitutionally required. (Order, p. 16).
>
> It was in the context of these findings that we set forth the criteria, heretofore mentioned, that must be followed during a determination to appoint a representative payee. We have examined the revised regulations, and now find that they satisfy our criteria and therefore comport with due process requirements.*

In *Fulk, et al. v. Moritz, et al.*, No. C74-230 (N.D. Ohio, September 28, 1981) plaintiffs were individuals who were committed for rehabilitative treatment to institutions under control of the Ohio Department of Mental Health and Mental Retardation. A three-judge panel addressed the issue of whether or not federal defendants provided the plaintiffs with procedural safeguards when designating representa-

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* That part of the decision relied upon by this Court was not appealed by State of Illinois to the United States Court of Appeals, Seventh Circuit, in *Tidwell v. Schweiker*, 677 F.2d 560, 564 (7th Cir. 1982).

tive payees for benefits to which plaintiffs are entitled under federal law. The court at page 5 stated that

> [i]t is clear today that at the very least the matter of who shall be named as a designated payee requires full notice and hearing, and is appealable, by proper procedural steps, to the United States Courts.
>
> Originally, a three-judge court of the Northern District of Illinois found, in the case of *Tidwell, et al. v. Weinberger*, Nos. 73-6-3014 and 74-6-183 (June 23, 1976), that the earlier provisions did not comport with due process. However, upon a later motion by the defendant in these cases to alter or amend the judgment, that Court held that it had examined the revised regulations and found that they comport with due process.
>
> This Court agrees with the conclusions of the *Tidwell* court. Even if this Court had jurisdiction to determine the issue, it would find that the plaintiffs' substantive claims are without merit, and this action should be dismissed.

In *McGrath v. Weinberger*, 541 F.2d 249, 254 (10th Cir. 1976), *cert. denied*, 430 U.S. 933 (1977), the action was brought by two social security recipients to challenge the constitutionality of the SSA procedure whereby a recipient may be determined to be incapable of managing his monetary benefits and a representative payee appointed. The Court held that "the Due Process Clause does not demand that prior notice and an opportunity for a hearing be afforded Social Security beneficiaries who are determined to be incapable of managing their own benefits." Finally, in *Mathews v. Eldridge*, *supra*, respondent

brought the action challenging the constitutionality of the procedures for terminating disability benefits. The Supreme Court held at page 321 that "an evidentiary hearing is not required prior to the termination of Social Security disability payments and the administrative procedures prescribed under the Act fully comport with due process."

This Court concludes that neither 42 U.S.C. § 405(j) nor the Due Process Clause of the Fifth Amendment requires the Secretary to provide the opportunity for an oral hearing prior to the initial selection or continuation of a representative payee. Given the procedures in effect for the determination that a beneficiary is in need of a representative payee and for the selection of a representative payee, this Court finds that the risk that a representative payee will be appointed who will not care for the welfare of the beneficiary is slight and the provision for an oral hearing prior to the selection of a payee will not significantly reduce the risk of possible error. The procedures provided sufficiently protect a beneficiary's right to due process and further are in balance with the Government's fiscal and administrative burden. While this Court is sympathetic to plaintiffs' claims, "procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions." *Mathews v. Eldridge, supra*, at page 344. Accordingly, this Court finds that the plaintiffs' Cross-Motion for Summary Judgment with respect to the provision of an oral hearing prior to the initial selection or continuation of a payee should be and is hereby DENIED and defendant's Motion for Summary Judgment should be and is hereby GRANTED.

Mandatory Periodic Accountings

The defendant contends that due process does not require mandatory periodic accountings by representative payees. Defendant states that there are more than 5 million social security beneficiaries in need of representative payment and for whom a payee has been selected and that an enormous fiscal and administrative burden would be created if each payee were required to file periodic accounts with the Social Security Administration. In addition, defendant claims that misuse in the rep payee program is limited to .5% of the cases. Defendant contends that the comprehensive procedures for the determination of need for representative payment and selection of a payee in conjunction with discretionary accounting provide adequate protection for the beneficiaries' property interest without creating an oppressive fiscal burden.

Defendant also contends that 42 U.S.C. § 405(j) does not vest beneficiaries with a right to "receipt and proper expenditure" of their benefits. Defendant cites *Watson v. Califano*, 487 F.Supp. 179, 186 S.D. N.Y. 1979), *aff'd*, 622 F.2d 577 (2nd Cir. 1980). In *Watson* minor children of a disabled worker sued the Secretary of Health, Education and Welfare to recover disability benefits paid for their benefit to their father as their representative payee. The court stated

> Because section 405(j) does not require any ongoing supervision or representative payees, and because section 405(a) gives the Secretary full power to promulgate any regulations which are necessary or appropriate to carry out that subchapter, "a court has quite literally no indicia by which it may evaluate that exercise (of dis-

cretion) and hence no power of review under § 701(a)(2)." *Greater New York Hospital Ass'n v. Mathews*, *supra*, at 498.

If the Secretary's actions were subject to review, the failure over a five year period to ensure that the benefits would be used for the beneficiaries would be found inexcusable. The language of the regulations and the suspended portions of the Social Security Claims Manual indicates that the Social Security Administration was keenly aware of the need to supervise representative payees in order to protect beneficiaries. In addition, the requirement of some type of annual accounting would not have been an undue burden on the Administration, but would have been borne by the representative payee required to prepare the submission. Even if the Administration lacked the resources to review the submission, or to verify them every third year as provided by the Manual, the mere threat of review and potential federal prosecution may have been enough to induce Mr. Watson to use the money for the benefit of his children.

* * * *

The situation here is a very unfortunate one, but one for which there is no remedy for the plaintiffs. Absent a broader jurisdictional grant and a more stringent Congressional mandate, the court is unable to impose upon the Secretary duties and responsibilities beyond those required in the statute.

Plaintiffs in *Watson* asserted that the jurisdiction of the court was based on 42 U.S.C. § 405(g), see page 182. Apparently, the court was not presented with a due process claim concerning the need for manda-

tory periodic accounting nor was *Watson* a class-action suit.

Plaintiffs contend that by definition, an individual who has been determined correctly to need a representative payee is not capable of monitoring or supervising the payee. Plaintiffs state that although defendant maintains that its preliminary study shows the rate of misuse of funds by payees to be only .5%, defendant also contends that an additional 1.3% of payees in the small preliminary sample were guilty of "improper" use, 20% of payees performed in a manner less than satisfactory, 7.4% of the cases examined warranted a change of payee, 6.1% of the payees kept inadequate records and another 17.9% of the payees had at least minor inconsistencies in their records. Plaintiffs state that their arguments do not depend on a contention that the majority of payees misuse funds; rather, plaintiffs contend that the risk of misuse or of other improper use is real, significant, and inherent in any representative payment system and that a recognition of such risk must enter into any analysis of the proper conduct of the representative payment program.

Plaintiffs further contend that using defendant's figures that the $9.7 million cash value of the 489 work-years saved by eliminating accounting and verification from the representative payee workload in 1979 divided by the 4,460,123 Social Security and S.S.I. beneficiaries who had representative payees resulted in a savings of $2.17 per beneficiary in payee status. Plaintiffs claim that not only is $2.17 a small fraction of each beneficiary's annual entitlement but that accounting will negate much of the cost incurred from payouts to representative payees not performing their duties satisfactorily.

Applying the factors in *Mathews v. Eldridge*, *supra*, this Court again finds that the private interest of beneficiaries in the receipt and proper use of social security benefits is substantial. This Court also finds that the risk of an erroneous deprivation of this interest through the procedures used is great and the probable value of mandatory accounting is substantial. This Court also finds that the fiscal and administrative burdens that mandatory accounting would entail would not be great.

In this class-action suit this Court has been presented with a due process claim concerning the need for mandatory periodic accounting. This Court concludes that the discretionary accounting procedures now in effect do not provide due process to the social security beneficiaries for whom representative payees have been appointed. Accordingly, defendant's Motion for Summary Judgment with respect to the provision for mandatory periodic accounting should be and is hereby DENIED. Plaintiffs' Cross-Motion for Summary Judgment with respect to the provision for mandatory periodic accounting should be and is hereby GRANTED. Defendant is directed to implement appropriate mandatory periodic accounting procedures within one year from the date of this Order.

Administrative and Judicial Review of Claims of Misuse

Defendant contends that neither the Social Security Act nor the Fifth Amendment requires administrative and judicial review of a claim of misuse made by a beneficiary against his representative payee. Defendant contends that the Social Security Act makes it clear that the payment of benefits pursuant to section 405(j) is "a complete settlement and

satisfaction of any claim, right, or interest in and to such payment." Section 405(k) of the Act, 42 U.S.C. 405(k). No due process violation exists due to failure of the Secretary to provide administrative and judicial review of a determination on a misuse claim because the claimant is deprived of nothing. Accordingly, defendant contends, the Secretary is not liable to the beneficiary for misuse by the rep payee of the beneficiary's funds; rather, if in fact a rep payee has converted funds of the beneficiary, the beneficiary can seek redress in state courts.

Plaintiffs contend that when an individual who has discovered that his or her representative payee misused benefits files a complaint of misuse with the Secretary, the Secretary's decision concerning misuse of benefits is, as a practical matter, dispositive of whether that individual will obtain redress of misuse of benefits or remain permanently deprived of all or part of the benefits to which he or she is entitled. If the SSA finds that misuse has occurred, its policy is to set in force various mechanisms in order to obtain redress for the beneficiary. Plaintiffs further contend that the Secretary's refusal to provide a hearing on a decision concerning misuse of benefits is that if a decision of "no misuse" is made the mechanisms available to the SSA for redress of misuse will not be triggered and the beneficiary will have no further practical remedy.

Applying the factors in *Mathews v. Eldridge*, *supra*, this Court again finds that the private interest of beneficiaries in the receipt and proper use of social security benefits is substantial. However, this Court finds that the risk of an erroneous deprivation of this interest through the procedures used is small and the probable value of administrative and judicial review

of claims of misuse is not substantial. Additionally, the fiscal and administrative burdens that administrative and judicial review of claims of misuse would entail would be great. Accordingly, this Court finds that the plaintiffs' Cross-Motion for Summary Judgment with respect to the provision of administrative and judicial review of claims of misuse should be and is hereby DENIED and defendant's Motion for Summary Judgment should be and is hereby GRANTED.

In summary, after a review of the contentions of the parties individually and as a whole to determine the "multiple effect", this Court finds that the defendant's Motion for Summary Judgment based upon its claim of lack of jurisdiction should be and is hereby DENIED; that the plaintiffs' Cross-Motion for Summary Judgment with respect to the provision of an oral hearing prior to the initial selection or continuation of a payee should be and is hereby DENIED and defendant's Motion for Summary Judgment should be and is hereby GRANTED with respect to this issue; that the defendant's Motion for Summary Judgment with respect to the provision for mandatory periodic accounting should be and is hereby DENIED and plaintiffs' Cross-Motion for Summary Judgment with respect to the provision for mandatory periodic accounting, should be and is hereby GRANTED; and that the plaintiffs' Cross-Motion for Summary Judgment with respect to the provision of administrative and judicial review of claims of misuse should be and is hereby DENIED and defendant's Motion for Summary Judgment should be and is hereby GRANTED as it pertains to administrative and judicial review of claims of misuse. Defendant is directed to comply with this Order with respect to the provision for man-

datory periodic accounting within one year from the date of this Order.

IT IS SO ORDERED this 17th day of March, 1983.

/s/ Lee R. West
LEE R. WEST
United States District Judge
Entered In Judgment Docket
on 3-11-83

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CIV-79-994-W

JEANNE A. JORDAN, ET AL., PLAINTIFFS

vs.

RICHARD S. SCHWEIKER, Secretary of Health and Human Services, DEFENDANT

[Filed Mar. 26, 1984]

ORDER

This matter comes before the Court upon plaintiffs' Motion for Order Enforcing Judgment. The parties submitted written memoranda and presented oral arguments on March 20, 1984.

On March 17, 1983, this Court directed the defendants to implement appropriate mandatory accounting procedures within one year in order to provide due process to social security beneficiaries for whom representative payees have been appointed. A judgment was entered and the defendants appealed from that judgment. Thereafter, defendant requested that the appeal be dismissed and the Court of Appeals granted the request.

The Social Security Administration (SSA) formulated a plan which it contends complies with the

requirements of this Court's Order. The plaintiffs allege that the proposed plan does not comport with this Court's mandate. Briefly stated, SSA's proposed plan requires that a form be sent to a random sample of ten percent payee repersentatives. After the forms are returned to SSA, they would be evaluated and if the answers provided by the representatives raised any questions, personal contact would be made and an additional form filled out.

Plaintiffs object to the proposed plan contending that it is inadequate. According to the plaintiffs, the form to be sent to the selected representative payees (Form SSA-623) does not require the representative payee to account for expenditures of social security benefits. Plaintiffs further argue that all representative payees should be required to complete an accounting form annually. Lastly, the plaintiffs contend that the Secretary's procedure for the review of accountings is inadequate.

The defendant contends that the proposed plan is both effective and efficient. According to the defendant, Form SSA-623 is an initial form designed to be an indicator of representative payee performance and not a final accounting statement. The defendant further contends that having a random sample of representative payees complete Form SSA-623 is adequate because SSA could not annually review accounting forms from all representative payees. Requiring only 10 percent of the representative payees to complete Form SSA-623 lessens needless paperwork for both SSA and the representative payees. The defendant also contends that the procedure for review of representative payee accounting forms is adequate.

After considering the written submissions by the parties and the oral arguments of counsel, the Court

is persuaded that the substantial interest of Social Security beneficiaries for whom representative payees have been appointed can only be adequately protected by requiring universal annual accountings. The Court is not convinced, however, that the Form SSA-623 adopted by the defendant is inadequate as an initial indicator of payee performance. The Court is mindful of the limited information which may be gleaned from this form, but the SSA-623 appears to be an acceptable compromise between ease in understanding and interpretation for the representative payees on one hand, and the need for adequate safeguards on the other. Additionally, a more complete accounting on Form SSA-624 will be required when answers on SSA-623 indicate there is such a need.

At this time, it appears that the defendant's proposals for verifying information on Form SSA-623 is adequate, and the Court is not disposed to set a minimum number of forms which must be verified. The Court assumes, of course, that the defendants will verify a reasonable number of forms in order to protect the social security beneficiaries' interest.

Accordingly, it is the order of this Court that the defendant take immediate steps to provide all representative payees with SSA-623 forms and ensure the completion and return of those forms. The defendant is further ordered to implement or maintain reasonable methods of verifying information submitted by representative payees.

IT IS SO ORDERED this 26th day of March, 1984.

/s/ Lee R. West
LEE R. WEST
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CIV-79-994-W

JEANNE A. JORDAN, ET AL., PLAINTIFFS

vs.

MARGARET HECKLER, Secretary
of Health and Human Services, DEFENDANTS

[Filed July 2, 1984]

ORDER

This matter comes before the Court upon Motion to Amend by the defendant, the Secretary of Health and Human Services. The plaintiffs have responded in opposition to this motion.

By Order dated March 26, 1984, this Court ruled that the Secretary's proposed accounting program was inadequate to comply with the Court's summary judgment ruling of March 17, 1983. The Court determined that in order to protect all beneficiaries for whom SSA has selected representative payees, all such payees must be required to annually report to the Secretary. The Secretary's proposal form SSA-623 was found to be an adequate initial indica-

tor of the propriety of the expenditure of the beneficiary's Social Security funds.

In her motion to amend, the Secretary has requested that the required universal accounting be waived for those beneficiaries who are institutionalized in the State facilities for the mentally ill and mentally retarded for whom the State institutions act as representative payee. As an alternative to the annual completion of form SSA-623 for these beneficiaries, the Secretary proposes the performance of on-site inspections at these institutions. The on-site review program was instituted in 1970 to monitor the performance of State institutions as representative payees. These inspections include interviews with staff members, review of the institution's expenditures and review of the institution's records for individual beneficiaries. The Social Security Administration has implemented some changes in the existing structure for conducting these on-site reviews. The program proposed by the Secretary (the Boston pilot program) significantly reduces the amount of time the Social Security Administration staff members spend at the institution and also abolishes interviews with the beneficiaries. On the other hand, the results of the inspection are made immediately available to the institution's administration instead of the lengthy delay under the old program. These on-site inspections are to be conducted at least once every three years.

The Secretary suggests that the revised on-site review program provides meaningful information regarding the expenditure of funds for these institutionalized beneficiaries. According to the Secretary, the needs of beneficiaries confined to institutions are distinct from those of other beneficiaries and are bet-

ter addressed by a program specifically designed for them.

In opposition to this motion, plaintiffs argue that although an on-site review program might be an acceptable method of protecting institutionalized beneficiaries, the program proposed by the Secretary is inadequate. In particular, plaintiffs object to the discontinuation of interviews with individual beneficiaries and the lack of a requirement that each institution be visited only once every three years. Plantiffs contend that the institutions should be required to complete form SSA-623 for all patients. According to plaintiffs, the institutions already maintain all information for completing the form so the additional burden on the institution would be slight. Additionally, plaintiffs contend that reviewing these forms along with the institution's individual patient accounts would provide adequate protection for the institutionalized beneficiary.

The Court is persuaded that the distinct needs of beneficiaries who are mentally ill or retarded and institutionalized in state or federal institutions and for whom the institution is the representative payee, can be better met by an on-site program than by the completion of form SSA-623. In order to adequately protect the needs of institutionalized beneficiaries, each institution acting as a representative payee must be the subject of an on-site review at least once every three years. The outline of the review conducted in the Boston pilot program appears to be adequate to protect the interests of these beneficiaries. The immediate communication of the results of the review to the institution's staff is particularly desirable.

While the Court is somewhat concerned by the frequency of the on-site reviews and their duration,

it is also apparent that these reviews are not the only evaluations of institutional performance which are conducted. In addition to the on-site inspections by reviewing teams, the district Social Security offices monitor the institution's performance as a representative payee. State mental health agencies also review the performance of institutions in providing care to the beneficiaries. The highly regulated nature of these institutions makes institutional misappropriation of funds less likely than in the case of individual representative payees.

Accordingly, it is the order of this Court that due to the distinct posture of beneficiaries institutionalized in state and federal facilities for the mentally ill and mentally retarded, the Secretary need not require the completion of form SSA-623 by institutions acting as payee representatives for those institutions. In lieu of this annual accounting procedure, the Secretary will perform on-site inspections at each of these institutions at least once every three years, as well as providing continual monitoring by district social security offices.

IT IS SO ORDERED this 2nd day of July, 1984.

/s/ Lee R. West
LEE R. WEST
United States District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CIV-79-994-W

JEANNE A. JORDAN, ET AL., PLAINTIFFS

vs.

MARGARET HECKLER, Secretary
of Health and Human Services, DEFENDANT

[Filed Jan. 18, 1985]

ORDER

This matter comes before the Court upon defendant's Motion For An Indicative Ruling and For Relief From Judgment. This case is currently pending before the United States Court of Appeals for the Tenth Circuit, therefore this Court is without jurisdiction to rule on a motion for relief from judgment pursuant to Rule 60(b). The Court will, however, grant defendant's motion for an indicative ruling and advise the parties that were such a motion presented, it would be denied.

Factual Background

Only a brief narration of the facts of this lengthy case is necessary in order to dispose of this motion.

On March 17, 1983, this Court entered an order finding, *inter alia*, that the due process clause of the Fifth Amendment required that the Social Security Administration implement mandatory, periodic accounting procedures:

> Applying the factors in *Mathews v. Eldridge*, *supra*, this Court again finds that the private interest of beneficiaries in the receipt and proper use of social security benefits is substantial. This Court also finds that the risk of an erroneous deprivation of this interest through the procedures used is great and the probable value of mandatory accounting is substantial. This Court also finds that the fiscal and administrative burdens that mandatory accounting would entail would not be great.
>
> In this class-action suit this Court has been presented with a due process claim concerning the need for mandatory periodic accounting. This Court concludes that the discretionary accounting procedures now in effect do not provide due process to the social security beneficiaries for whom representative payees have been appointed.

Order, March 17, 1983.

On March 26, 1984, this case was once more before the Court.[1] At that time the Court was asked to determine whether defendant's plan to submit an accounting form to only ten percent of payee representatives was adequate to comply with the Court's

---

[1] Notice of appeal of the Court's March 26, 1984, order was filed by defendant on August 29, 1984. It is this appeal which is currently pending before the United States Court of Appeals for the Tenth Circuit.

order. The Court found that the substantial interest of Social Security beneficiaries for whom representative payees have been appointed could be adequately protected only by requiring universal annual accountings.

The Secretary thereafter requested that the Court amend its March 26, 1984, order so as to exempt from the mandatory annual accountings State institutions which act as representative payees for beneficiaries who are institutionalized in State facilities. The Court did allow the Secretary to waive the filing requirements of these representative payees. However, the Court made it clear that its decision to waive the annual accounting by these institutions was due to the careful scrutiny these representative payees receive from other sources:

> While the Court is somewhat concerned by the frequency of the on-site reviews and their duration, it is also apparent that these reviews are not the only evaluations of institutional performance which are conducted. In addition to the on-site inspections by reviewing teams, the district Social Security offices monitor the institution's performance as a representative payee. State mental health agencies also review the performance of institutions in providing care to the beneficiaries. The highly regulated nature of these institutions makes institutional misappropriation of funds less likely than in the case of individual representative payees.

Contentions of the Parties

In her motion, the Secretary argues that the Court should indicate its willingness to grant a motion for relief from judgment or order pursuant to Rule

60(b), Fed. R. Civ. P. In support of her argument, the Secretary relies on Rule 60(b)(6):

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (6) any other reason justifying relief from the operation of the judgment."

Rule 60(b)(6), Fed. R. Civ. P. Defendant argues that she is entitled to such relief due to the enactment of Public Law No. 98-460. According to the Secretary, that statute conflicts with the Court's order requiring mandatory annual accounting and the order should, therefore, be amended to comply with the statute.

In response plaintiffs argue that the Court has already determined that mandatory periodic accounting is required by the due process clause of the Fifth Amendment. According to plaintiffs, this constitutional requirement establishes a minimal requirement of payee accountability which was not abrogated by the enactment of Public Law No. 98-460.

Indicative Ruling

Normally, the filing of a notice of appeal deprives the trial court of jurisdiction. The trial court does, however, retain jurisdiction to consider how it would rule on a Rule 60(b) motion. *Aune v. Reynders*, 344 F.2d 835, 841 (10th Cir. 1965). If the Court indicates that it will grant the motion the movant may then ask the Court of Appeals to remand the case, thus avoiding the necessity of a ruling on the appeal. *Id.* In order to expedite this already old case, the Court will grant defendant's motion for an indicative ruling.

The Court must, however, agree with plaintiffs' argument that defendant is not entitled to relief from judgment.

The Social Security Disability Benefits Reform Act of 1984, Public Law No. 98-460, was enacted on Octoebr 9, 1984. Section 16 of Public Law No. 98-460 provides the following:

> Sec. 16.(a) Section 205(j) of the Social Security Act is amended by inserting "(1)" after "(j)" and by adding at the end thereof the following new paragraphs:
>
> * * * * *
>
> (3)(A) In any case where payment under this title is made to a person other than the individual entitled to such payment, the Secretary shall establish a system of accountability monitoring whereby such person shall report not less often than annually with respect to the use of such payments. The Secretary shall establish and implement statistically valid procedures for reviewing such reports in order to identify instances in which such persons are not properly using such payments.
>
> (B) Subparagraph (A) shall not apply in any case where the other person to whom such payment is made is a parent or spouse of the individual entitled to such payment who lives in the same household as such individual. The Secretary shall require such parent or spouse to verify on a periodic basis that such parent or spouse continues to live in the same household as such individual.
>
> (C) Subparagraph (A) shall not apply in any case where the other person to whom such payment is made is a State institution. In such

> cases, the Secretary shall establish a system of accountability monitoring for institutions in each State.
>
> (D) Subparagraph (A) shall not apply in any case where the individual entitled to such payment is a resident of a Federal institution and the other person to whom such payment is made is the institution.
>
> (E) Notwithstanding subparagraphs (A), (B), (C), and (D), the Secretary may require a report at any time from any person receiving payments on behalf of another, if the Secretary has reason to believe that the person receiving such payments is misusing such payments . . .

Section 16(b) of Public Law No. 98-460 amends Section 1631(a)(2) of the Social Security Act by adding the same requirements as those in Section 16(a) for payments made to representative payees under Section 1631(A)(2).[2]

As defendant notes, the amendments in Section 16 differ in two respects from the requirements set out in this Court's orders, *e.g.*, (1) representative payees who are parents or spouses of the beneficiary and who are living in the same household with the beneficiary need only verify the continuation of that living arrangement and are not required to file an annual accounting; and (2) Federal institutions are exempt from accounting.

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[2] Implicit in Congress' exception for spouses and parents who live in the same house is the assumption that a representative payee who is closely related to the beneficiary need not be monitored as closely as others. The Court directs the readers attention to the original complaint in this case in which the named plaintiff, Jeanne Jordan, challenged the propriety of her sister's actions while her sister acted as Jordan's representative payee.

Defendant has not offered any evidence that the due process requirements relied upon by this Court in its prior orders have been satisfied. The Court quite specifically ruled in its March 17, 1983, order that due process required mandatory periodic accounting by payee representatives. While the Court is well aware of the deference usually given Congressional actions, the fact that Congress has enacted some reforms does not change the constitutional requirements. The only way by which the Secretary can avoid the mandatory annual accounting is to establish that beneficiaries' due process rights are being adequately provided through some alternative means. The Court's finding that due process was being provided in the case of institutional beneficiaries was the basis for the Court's allowing the Secretary to waive an accounting by State institutions under certain circumstances. However, no such showing has been made for either of the two categories set out above. Beneficiaries in these two categories have the same rights under the due process clause as do all other beneficiaries for whom representative payees have been appointed.

Defendant should not read this order as an invitation to present further evidence on the two categories of beneficiaries above. The Court is aware that with a case of such magnitude it is difficult to anticipate all questions which may arise in implementing a program such as here prescribed. However, the Secretary has had several chances to present the necessary evidence and has failed to do so. The Court will not indefinitely delay the termination of this case to allow the Secretary to present evidence which could have been presented at least ten months ago.

Accordingly, it is the order of this Court that defendant's Motion For An Indicative Ruling should be and hereby is GRANTED. The Court has determined that it could not grant a Rule 60(b) motion were such motion presented.

IT IS SO ORDERED this 18th day of January, 1985.

/s/ Lee R. West
LEE R. WEST
United States District Judge

APPENDIX H

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 84-2226

JEANNE A. JORDAN, ET AL., PLAINTIFFS-APPELLEES

v.

OTIS T. BOWEN, Secretary of Health and Human Services, DEFENDANT-APPELLANT

Appeal from the United States District Court
For the Western District of Oklahoma
(D.C. No. CIV-79-994-W)

[Filed Jan. 5, 1987]

Before HOLLOWAY, Chief Judge, and BALDOCK and McWILLIAMS, Circuit Judges.

McWILLIAMS, Circuit Judge.

Under the Social Security Act, a "representative payee" appointed by the Secretary of Health and

Human Services receives benefits for the use of a "beneficiary" unable to manage his or her own affairs. 42 U.S.C. §§ 405(j) and 1383(a)(2). The individual plaintiffs brought the present action in September, 1979, against the Secretary, seeking, *inter alia*, to compel the Secretary to adopt a plan calling for mandatory periodic accounting by such representative payees. There are approximately 5.5 million Title II and Title XVI beneficiaries in representative payment status.

In September, 1980, the district court certified a nationwide plaintiff class consisting of all recipients of Social Security benefits (Title II) and Supplemental Security Income (Title XVI) who then had a representative payee or had such a payee within six years prior to the filing of the action. Discovery ensued, and thereafter the plaintiffs and the defendant filed motions for summary judgment.

On March 17, 1983, the district court ruled against the plaintiffs on all issues raised by the motions for summary judgment except the one that precipitates the present appeal. In this latter regard, the district court held that due process requires mandatory periodic accounting by representative payees and ordered the Secretary to "implement appropriate mandatory periodic accounting procedures within one year from the date of this Order." Both parties appealed from this order. The Secretary later moved to dismiss his appeal, which motion was granted and his appeal was dismissed. The plaintiffs' cross-appeal continued and was later heard by a panel of this Court, which affirmed that portion of the order of the district court which the plaintiffs appealed. Jordan v. Heckler, 744 F.2d 1397 (10th Cir. 1984).

On February 1, 1984, plaintiffs filed a motion to enforce the judgment and order of March 17, 1983.

The Secretary, in the meantime, had developed a proposed accounting program for representative payees, which, in essence, included notification to all representative payees that they must maintain records regarding the use of benefits received and that they might be required to account for the use of these benefits. Further, under the proposed plan, there would be an annual selection of 10 percent of these representative payees for an actual accounting and a follow-up verification for those payees who did not respond to the request for an accounting or those response was inadequate.[1]

The plaintiffs objected to the Secretary's proposed plan, and the district court, after hearing, on March 26, 1984, rejected the proposed plan, holding, *in essence*, that due process required that all representative payees make a periodic accounting. Specifically, the district court ordered the Secretary to take "immediate steps to provide all representative payees with SSA-623 forms and ensure the completion and return of those forms. The defendant is further ordered to implement or maintain reasonable methods of verifying information submitted by representative payees." [2]

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[1] We do not know whether a formal proposed accounting program was actually submitted to the district court. However, the essentials of the program were outlined in documents filed with the district court and included in the record on appeal. As proposed, the plan would have resulted in annual accountings for approximately 550,000 beneficiaries whose payments were made through representative payees.

[2] SSA Form-623 was an initial form designed to be an indicator of representative payee performance. Based on the payee's responses or non-responses, the form could trigger Form SSA-624, which would require more detailed expenditures information and involve a home visit and interviews.

The Secretary filed a notice of appeal from the district court's order of March 26, 1984.[3] That appeal was dismissed by this Court as being premature since a motion under Fed. R. Civ. P. 59 was then pending in the district court. On July 2, 1984, the district court granted the Rule 59 motion and amended its earlier order of March 26, 1984, to the end that the Secretary need not require the completion of form SSA-623 by institutions acting as representative payees for mentally ill and mentally retarded beneficiaries within their institutions, the district court believing that an on-site inspection of such institutions was sufficient.[4] On August 29, 1984, the Secretary again filed a notice of appeal from the district court's order of March 26, 1984, as amended by its order of July 2, 1984. A stay of the district court's order, as amended, was granted by another panel of this Court.

On October 9, 1984, the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794, became law. Section 16 of this Act provides for monitoring of all representative payees through, *inter alia*, an accounting program. The statute, however, exempts from the accounting program all representative payees whose beneficiaries are their children or their spouse and who live in the same household as the representative payee. We are advised that the Secretary, while the present appeal

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[3] We express no opinion as to whether the district court's order of March 26, 1984, is a *final* judgment. From the record before us it is difficult to tell.

[4] The district court ordered that institutions acting as representative payees must undergo on-site reviews by the Secretary at least once every three years; further, continual monitoring by district Social Security offices must be provided.

was pending in this Court, filed a motion in the district court for an "Indicative Ruling" and Relief from Judgment, asserting that the new statutory accounting requirements were adequate and thus the district court's earlier order was unnecessary.[5] In connection with that motion, the district court, by order of January 18, 1985, recognized that it had no jurisdiction to *grant* relief from judgment under Fed. R. Civ. P. 60(b) since an appeal was then pending in this Court. However, the district court, citing Aune v. Reynders, 344 F.2d 835 (10th Cir. 1965), "indicated" that it would not grant any relief from judgment on the grounds urged by the Secretary, i.e., the intervening Act of Congress. In thus indicating, the district court opined that the 1984 Act of Congress did not measure up to the requirements of due process, and that due process required some form of mandatory periodic accounting by *all* representative payees, excepting only institutions acting as representative payees.

The present appeal is from the district court's order of March 26, 1984, as amended by its order of July 2, 1984. Appellate procedure requires that an appellant's brief shall contain an argument with appellant's contentions with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on. Fed. R. App. P. 28(a)(4). Appellants who fail to argue the issue in their brief are deemed to have waived their contention on appeal. Bledsoe v. Garcia, 742 F.2d 1237, 1244 (10th Cir. 1984).

In this Court, the Secretary makes no attack, as such, on the March 26 order of the district court.

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[5] The motion is not included in the record before us. Hence, we do not know its contents.

In other words, the Secretary in the present appeal makes *no* argument that an annual accounting by 10 percent of the representative payees meets due process. Accordingly, the Secretary has, in a real sense, abandoned any challenge to the order from which the appeal is taken. In such circumstance, the appeal should be dismissed.

However, the Secretary, in the present appeal, attempts to challenge, and vigorously so, the district court's so-called indicative order of January 18, 1985. In this connection, the Secretary argues that the 1984 Act of Congress is constitutional, i.e., it is not violative of due process even though because of its exceptions it does not require mandatory periodic accounting by all representative payees, and that the Act therefore controls. We do not regard that particular matter to be before us in the present appeal.

In its order of January 18, 1985, the district court relied on Aune v. Reynders, 344 F.2d 835 (10th Cir. 1965) as authority for its consideration of the Secretary's motion for relief from judgment. In *Aune*, at page 841, this Court spoke as follows:

> In ordinary civil cases the rule is that after an appeal has been taken the district court retains jurisdiction to consider and deny a Rule 60(b) motion and, if it indicates that it will grant the motion, the movant may then ask the Court of Appeals to remand the case so that the district court may act. If the motion is denied, the movant may appeal from the order of denial.

In its order of January 18, 1985, the district court purported to "grant" the Secretary's motion for an indicative ruling, but, at the same time, the district court also clearly stated that it would *not*

grant the Secretary any relief from the judgment entered on March 26, 1984. Although such does not comport precisely with the language from *Aune* above cited, the effect of the district court's order of January 18, 1985, was, and clearly so, to deny the Secretary any relief from judgment.[6] From our search of the record before us, no appeal was taken by the Secretary from the district court's order of January 18, 1985. Therefore, the correctness of that particular order is not before us by direct appeal and cannot somehow be rejected into the appeal from the district court's order of March 26, 1984.

This appeal is dismissed.

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[6] This Court in *Aune* cited Grecar v. Grecar, 288 F.2d 466 (9th Cir. 1961). In *Grecar*, the Ninth Circuit commented as follows:

> In such circumstances the proper procedure is for appellant to file its rule 60(b) motion in the district court. If that court indicates that it will grant the motion, appellant should then make a motion in this court for a remand of the case in order that the district court may grant such relief, following which a supplemental record showing such proceedings may be filed in this court. Appellant may appeal from an order of the district court denying the rule 60(b) motion, and appellee may appeal from an order of the district court granting such relief, any such appeal to be consolidated with the pending appeals. Citing Binks Mfg. Co. v. Ransburg Electro-Coating Co., 281 F.2d 252, 260-61 (7th Cir. 1960); Ferrell v. Trailmobile, Inc., 223 F.2d 697, 699 (5th Cir. 1955); Smith v. Pollin, 194 F.2d 349-350, (D.C. Cir. 1952).

APPENDIX I

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 83-1636, 84-1438

JEANNE A. JORDAN, individually, and on behalf of all other persons similarly situated,
PLAINTIFF-APPELLANT

v.

MARGARET M. HECKLER, individually, and in her official capacity as Secretary of the Department of Health and Human Services, DEFENDANT-APPELLEE

JEANNE A. JORDAN, individually, and on behalf of all other persons similarly situated,
PLAINTIFF-APPELLEE

v.

MARGARET M. HECKLER, individually, and in her official capacity as Secretary of the Department of Health and Human Services, DEFENDANT-APPELLANT

Sept. 24, 1984

Rehearing Denied Jan. 22, 1985

in No. 84-1438

Before SETH, Chief Judge, and DOYLE and SEYMOUR, Circuit Judges.

SETH, Chief Judge.

The Social Security Act at 42 U.S.C. § 405(j) provides that benefits under certain circumstances may be paid directly to the applicant or to a representative for the benefit of the applicant. Thus:

> "When it appears to the Secretary that the interest of an applicant entitled to a payment would be served thereby, certification of payment may be made, regardless of the legal competency or incompetency of the individual entitled thereto, either for direct payment to such applicant, or for his use and benefit to a relative or some other person."

The "certification" is the significant act of the Secretary in this context. Procedures have been established to determine the "need" for a representative and "who" it should be with notice to the claimant.

The trial court concluded that the procedure was adequate under the statute and met due process requirements after making the evaluation under *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18, and *Tidwell v. Schweiker*, 677 F.2d 560 (7th Cir.). This issue was considered by this court in *McGrath v. Weinberger*, 541 F.2d 249 (10th Cir.).

Thus, this is the approved procedure for the determination of "need" and who is to act as a representative. The plaintiffs in the trial court contested this issue asserting that more was required. However, they did not pursue their appeal on this issue. Their appeal or cross-appeal is now directed only to claims

that the person selected as a representative as above described has misapplied the funds.

In this context we should first note a significant and basic statutory provision in 42 U.S.C. § 405(k) which relates to the remaining issue of misuse. This subsection reads in part:

> "Any payment made after December 31, 1939, under conditions set forth in subsection (j), any payment made before January 1, 1940, to, or on behalf of, a legally incompetent individual, and any payment made after December 31, 1939, to a legally incompetent individual without knowledge by the Secretary of incompetency prior to certification of payment, if otherwise valid under this title, shall be a complete settlement and satisfaction of any claim, right or interest in and to such payment."

Under the statute the payment to the representative discharges the Secretary from any further obligation "as to such payment." The plaintiffs thus challenge the procedure followed by the Secretary in handling claims made by beneficiaries (or for them) of misuse of funds by the representative certified to receive payment as above described. The plaintiffs urge that under 42 U.S.C. § 405(b) there should be a hearing and review when such a claim of misuse is made. The Secretary's position and the regulations promulgated under § 405(b) is that only actions which prejudice the claimant's rights specifically provided in the Act trigger an administrative hearing and judicial review. These actions are described as "initial determinations" in the regulations. Claims as to a representative's misuse of funds are not within that category under the regulations. *See Califano v. San-*

ders, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192. The claimant's right to payments under § 405(j) is established by the certification of payment to the representative.

Under existing procedure the agency examines the objection and makes a decision to request restitution or to take no action. There is no "hearing" on the claim. Again, the Secretary has discharged her duty upon certification and payment. A claim may be the basis for a change in the representative, but this does not have any consequences as to the dollars. There is an adequate remedy for impairment of the free use of benefits. *McGrath v. Weinberger*, 541 F.2d 249 (10th Cir.).

The only action that the agency can take if there appears to be a misapplication of funds by the payee is to "request" restitution and refer the incident to the General Accounting Office. Claims of this nature in this appeal have no relation whatsoever to a termination of benefits or to the dollars from the agency. The claims could however go against the representative as an individual with state law remedies available. The regulations provide procedures for change of representatives. Requests for a change of representative may be made at any time. The trial court on this matter of claims of misuse of funds again made an analysis under *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18, and we agree that the circumstances do not warrant the treatment of such claims as an initial determination.

As we have seen, a hearing on claims of misuse would add no statutorily required nor due process procedures. The trial court ordered that the agency require, beginning at a date in the future, periodic accountings by the representatives. The Secretary

apparently has agreed to do this. The accountings would in no way change the legal nature of the proceedings taken on misuse complaints under the Act or as to due process nor add requirements.

We express no opinion as to whether accountings can be required under the Act or for due process reasons.

The judgment of the trial court is affirmed as to its disposition of all issues except the one relating to accountings by representatives which is not considered to be an issue on this appeal.

IT IS SO ORDERED.

84-1438

This is an appeal by the Government (consolidated with No. 83-1636) of an Order which assessed attorney fees against it in the amount of $76,159.20 under the Equal Access to Justice Act (28 U.S.C. § 2412). The suit challenged the procedure whereby representatives are selected to receive payments on behalf of Social Security benefit recipients, whether such representatives should be required to make periodic accountings, and how complaints of misuse of funds should be handled.

The portion of the case which was appealed is set forth above in No. 83-1636, *Jordan v. Heckler*.

In this appeal the Government asserts that the trial court was in error in using, at least in part, 28 U.S.C. § 2412(b) of the Act, and so placing reliance on a common fund or common benefit theory. The Government also challenges the "exceptional success" determination by the trial court as it was applied to decide compensable hours in view of the plaintiffs' success on but one out of the three claims advanced.

The issue whether the several claims were related or unrelated for this purpose is also raised.

We must conclude that the doctrines arising from traditional practice in equity of common fund or common benefit included in 18 U.S.C. § 2412(b) are not applicable to this case. The trial court referred to and used § 2412(b) in its analysis and order. The court in part said: "[J]urisdiction over the subject matter of this suit makes possible an award that will operate to spread the costs proportionately among each of these beneficiaries."

An award of fees against the Secretary does not have such a consequence. If the award is taken from the Social Security Trust Fund it will not in any way reduce the payments to Social Security recipients in representative status. The Trust Fund comes from Social Security taxes on all workers and from general Treasury funds. Is is simply an award against the Government or all persons who pay Social Security taxes and is not related or restricted to those who number some four million.

This situation thus does not resemble the suit against the union in *Hall v. Cole*, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702, nor the shareholder derivative cases such as *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593, the issue in *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184, nor the pension fund in *Kiser v. Huge*, 517 F.2d 1275 (D.C.Cir.).

In *Mills* the court determined that with the fees paid by the corporation, the benefits of the merger suit would be proportionately spread among the shareholders which was the group benefited. In the union case, *Hall v. Cole*, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702, the benefits under the disclosure act obtained by the action accrued to each union member

and payment out of union funds according to the Court "shift[s] the costs of litigation to 'the class that has benefited . . . .'" Thus the costs are spread among the group members who have benefited and spread in a reasonable and fair manner. The "spreading" of the burden in the case before us was not among the group which was benefited but placed on a much larger group, most of whom had no interest.

Of course, the basic considerations are expressed by the Court in *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141, where reference in a note is made to its previous opinions:

> "In this Court's common-fund and common-benefit decisions, the classes of beneficiaries were small in number and easily identifiable. The benefits could be traced with some accuracy, and there was reason for confidence that the costs could indeed be shifted with some exactitude to those benefiting."

There is no way in the case before us that with the fees assessed against the Secretary there was any allocation to those four million recipients with representative payees if they were the parties benefited.

Thus again in *Boeing Co. v. Van Gemert*, 444 U.S. 472, 100 S.Ct. 745, 62 L.Ed.2d 676, the Court said after discussing the common fund cases and the origin of the doctrine:

> "The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense."

And:

> "Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit."

The Court in *Boeing* also refers to the statements in *Alyeska* where shifting of fees was appropriate. Thus where the classes benefited were "small in number and easily identifiable," the "benefits could be traced with some accuracy," where the shifting could be accomplished, "with some exactitude to those benefiting." Thus the fees here considered can properly be assessed only under § 2412(d) which in part provides that the court shall award fees unless it finds that "the position of the United States was substantially justified or that special circumstances make an award unjust." A maximum per hour rate is specified. The fees are to be "reasonable" and based on the "prevailing market rate." The "reasonable" proviso would seem to draw into the consideration of fees the opinions under other statutes wherein the reasonable standard is expressly provided.

As the opinion on the merits indicates, the plaintiffs advanced three claims and they prevailed on one —that representatives should be required to file periodic accountings. The claim for a hearing before a representative was designated and was lost as was a claim for a hearing on claims made against representatives for misuse of funds.

Plaintiffs' success was partial. The trial court determined that plaintiffs were the prevailing parties apparently based on the accounting claim. This appears to be a close question. We cannot say however that the trial court abused its discretion. The Secretary had some years before instituted an accounting requirement although of a limited scope. This was

dropped, according to the record, because of budget limitations. During the same period as the litigation was underway a study was being conducted as to the need for accountings. This study was completed and filed with the court. It concluded that accountings were necessary. The Secretary did not appeal the trial court's order as to accounting, and indicated that it agreed with it. The Secretary asserts in this appeal that she did not oppose *in principle* the accounting claim in the trial court. The trial court's original order was in general terms.

We have considered various aspects of attorney fees claims under several statutes in *Cooper v. Singer*, 719 F.2d 1496 (10th Cir.), *Ramos v. Lamm*, 713 F.2d 546 (10th Cir.), *Gurule v. Wilson*, 635 F.2d 782 (10th Cir.), *Battle v. Anderson*, 614 F.2d 251 (10th Cir.), and in *Francia v. White*, 594 F.2d 778 (10th Cir.), and other cases.

The Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40, shortly before our decision in *Ramos v. Lamm*, laid down the basic considerations. The Court in March of this year in *Blum v. Stenson*, —— U.S. ——, 104 S.Ct. 1541, 79 L.Ed.2d 891, in a 42 U.S.C. § 1988 claim, set forth most if not all of the basic standards. It also contains a strong message for the simplification of the analysis. *Blum* also describes the assumptions or presumptions now to be applied to the typical elements. For example, the novelty and complexity are "reflected" in the number of hours; the "skill" element and "quality" are reflected in the reasonableness of the rates. The Court also there states that "results" are subsumed in other factors used to calculate a reasonable fee." Further, in *Blum* the Court said: "Nor do we believe that the *number* of persons benefited is a consideration of significance in calculat-

ing fees under § 1988." (Emphasis in original.) Apparently the only element not treated in *Blum* was that of "risk" of loss.

Blum, of course, starts with the position (as in *Hensley*) that the prevailing market rate times reasonable hours should produce a reasonable fee. The inference in *Blum* is that a strong showing is required for a variation.

Blum also for our purposes repeats the "exceptional success" formulation. Thus:

> "In sum, we reiterate what was said in *Hensley*: 'where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhancement award may be justified.' *Hensley*, [461] U.S., at [435] [103 S.Ct., at 1940]."

We understand the "excellent results" pertain to the entire litigation—considering it as a whole.

The court here decided that the plaintiffs had obtained "excellent results" although they did not prevail on all their claims. We do not know whether we would have arrived at the same conclusion, but we cannot say that the trial court abused its discretion. The trial court made a finding that the Government's position was not substantially justified, and we find no abuse of discretion on this point.

Thus the fees should be computed on all the hours reasonably expended in the litigation by plaintiffs' counsel within the statutory limitation on the hourly rate since no special circumstances have been found to exist. The trial court made no determination.

The case (84-1438) is remanded for a determination of fees as provided herein. IT IS SO ORDERED.

APPENDIX J

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 84-2226

JEANNE A. JORDAN, individually and on behalf of all other persons similarly situated,
PLAINTIFF-APPELLEE

vs.

OTIS R. BOWEN, individually and in his official capacity as Secretary of the Department of Health and Human Services, DEFENDANT-APPELLANT

June 19, 1987

Before Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable John P. Moore, Honorable Stephen H. Anderson, Honorable Deanell R. Tacha and Honorable Bobby R. Baldock, Circuit Judges

The court has for consideration in the captioned case:

1. Appellee's motion to vacate the court's April 16, 1986 order staying orders of the United States Dis-

trict Court for the Western District of Oklahoma pending appeal and appellant's response.

2. Appellant's petition for rehearing and suggestion for rehearing en banc, appellee's memorandum in opposition thereto, and appellant's motion to stay action on the petition for rehearing.

3. Appellant's letter of April 27, 1987, and appellee's motion to strike that letter.

Upon consideration whereof, the hearing panel, consisting of Judges Holloway, McWilliams and Baldock, denies appellee's motion to strike and orders appellant's April 27, 1987 letter docketed and included in the case file.

The hearing panel further denies appellants' motion to stay action on the petition for rehearing and hereby denies the petition for rehearing.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Issuance of the mandate on June 29, 1987, pursuant to Fed.R.App.P. 41(a) will automatically terminate the stay entered on April 16, 1986, and will render appellee's motion to vacate the stay moot.

/s/ Robert L. Hoecker
ROBERT L. HOECKER
Clerk

APPENDIX K

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 84-2226

JEANNE A. JORDAN, individually and on behalf of all other persons similarly situated,
PLAINTIFFS-APPELLEES

v.

OTIS T. BOWEN, Secretary of Health and Human Services, DEFENDANT-APPELLANT

April 16, 1986

Before Honorable John P. Moore and Honorable Deanell R. Tacha, Circuit Judges, United States Court of Appeals

This matter is before the court on appellees' motion to dismiss the appeal for lack of jurisdiction and appellant's motion for stay pending appeal.

Upon consideration thereof, it is ordered that the motion to dismiss is denied.

It is further ordered that orders of the United States District Court for the Western District of Oklahoma in case No. CIV 79-994-W entered March 26, 1984, and July 2, 1984, are stayed during the pendency of this appeal. It is further ordered that appellees' answer brief shall be filed and served within thirty days of the date of this order.

/s/ Robert L. Hoecker
ROBERT L. HOECKER
Clerk

APPENDIX L

STATUTORY PROVISIONS INVOLVED

1. Section 205(j) of the Social Security Act, as amended by Section 16 of the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1809, and as coidfied at 42 U.S.C. (Supp. III) 405(j), provides:

> Certification for direct or indirect payment; investigation; accountability monitoring; exceptions; reports to Congress
>
> (1) When it appears to the Secretary that the interest of an applicant entitled to a payment would be served thereby, certification of payment may be made, regardless of the legal competency or incompetency of the individual entitled thereto, either for direct payment to such applicant, or for his use and benefit to a relative or some other person.
>
> (2) An certification made under paragraph (1) for payment to a person other than the individual entitled to such payment must be made on the basis of an investigation, carried out either prior to such certification or within forty-five days after such certification, and on the basis of adequate evidence that such certification is in the interest of the individual entitled to such payment (as determined by the Secretary in regulations). The Secretary shall ensure that such certifications are adequately reviewed.
>
> (3)(A) In any case where payment under this subchapter is made to a person other than the individual entitled to such payment, the Sec-

retary shall establish a system of accountability monitoring whereby such person shall report not less often than annually with respect to the use of such payments. The Secretary shall establish and implement statistically valid procedures for reviewing such reports in order to identify instances in which such persons are not properly using such payments.

(B) Subpargraph (A) shall not apply in any case where the other person to whom such payment is made is a parent or spouse of the individual entitled to such payment who lives in the same household as such individual. The Secretary shall require such parent or spouse to verify on a periodic basis that such parent or spouse continues to live in the same household as such individual.

(C) Subparagraph (A) shall not apply in any case where the other person to whom such payment is made is a State institution. In such cases, the Secretary shall establish a system of accountability monitoring for institutions in each State.

(D) Subparagraph (A) shall not apply in any case where the individual entitled to such payment is a resident of a Federal institution and the other person to whom such payment is made is the institution.

(E) Notwithstanding subparagraphs (A), (B), (C), and (D), the Secretary may require a report at any time from any person receiving payments on behalf of another, if the Secretary has reason to believe that the person receiving such payments is misusing such payments.

(4)(A) The Secretary shall make an initial report to each House of the Congress on the im-

plementation of paragraphs (2) and (3) within 270 days after October 9, 1984.

(B) The Secretary shall include as a part of the annual report required under section 904 of this title, information with respect to the implementation of paragraphs (2) and (3), including the number of cases in which the payee was changed, the number of cases discovered where there has been a misuse of funds, how any such cases were dealt with by the Secretary, the final disposition of such cases, including any criminal penalties imposed, and such other information as the Secretary determines to be appropriate.

2. Section 1631(a)(2) of the Social Security Act, as amended by Section 16 of the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1809-1810, and codified at 42 U.S.C. (Supp. III) 1383(a)(2), provides:

§ 1383. Procedure for payment of benefits

(a) Time, manner, form, and duration of payments; promulgation of regulations

* * * * *

(2)(A) Payments of the benefit of any individual may be made to any such individual or to his eligible spouse (if any) or partly to each, or, if the Secretary deems it appropriate to any other person (including an appropriate public or private agency) who is interested in or concerned with the welfare of such individual (or spouse). Notwithstanding the provisions of the preceding sentence, in the case of any individual or eligible spouse referred to in section 1382(e)(3)(A) of this title, the Secretary shall provide for making payments of the benefit to any other person (in-

cluding an appropriate public or private agency) who is interested in or concerned with the welfare of such individual (or spouse).

(B) Any determination made under subparagraph (A) that payment should be made to a person other than the individual or spouse entitled to such payment must be made on the basis of an investigation, carried out either prior to such determination or within forty-five days after such determination, and on the basis of adequate evidence that such determination is in the interest of the individual or spouse entitled to such payment (as determined by the Secretary in regulations). The Secretary shall ensure that such determinations are adequately reviewed.

(C) (i) In any case where payment is made under this subchapter to a person other than the individual or spouse entitled to such payment, the Secretary shall establish a system of accountability monitoring whereby such person shall report not less often than annually with respect to the use of such payments. The Secretary shall establish and implement statistically valid procedures for reviewing such reports in order to identify instances in which such persons are not properly using such payments.

(ii) Clause (i) shall not apply in any case where the other person to whom such payment is made is a parent or spouse of the individual entitled to such payment who lives in the same household as such individual. The Secretary shall require such parent or spouse to verify on a periodic basis that such parent or spouse continues to live in the same household as such individual.

(iii) Clause (i) shall not apply in any case where the other person to whom such payment is made is a State institution. In such cases, the Secretary shall establish a system of accountability monitoring for institutions in each State.

(iv) Clause (i) shall not apply in any case where the individual entitled to such payment is a resident of a Federal institution and the other person to whom such payment is made is the institution.

(v) Notwithstanding clauses (i), (ii), (iii), and (iv), the Secretary may require a report at any time from any person receiving payments on behalf of another, if the Secretary has reason to believe that the person receiving such payments is misusing such payments.

(D) The Secretary shall make an initial report to each House of the Congress on the implementation of subparagraphs (B) and (C) within 270 days after October 9, 1984. The Secretary shall include in the annual report required under section 904 of this title, information with respect to the implementation of subparagraphs (B) and (C), including the same factors as are required to be included in the Secretary's report under section 405(j)(4)(B) of this title.

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No. 87-230

In The

Supreme Court of the United States

October Term, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,

Appellant,

v.

JEANNE A. JORDAN,
on behalf of herself and all others similarly situated,

Appellees.

On Appeal From The United States District Court For The Western District Of Oklahoma

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

Appellees do not accept the Secretary's characterization of the appeal. Rather, there are three questions for consideration which should be stated as follows:

1. Whether or not there is jurisdiction under 28 U.S.C. § 1252 for review of the Secretary's appeal.

2. Whether or not the Secretary's appeal should be dismissed based on the doctrine of the "law of the case".

3. Whether there was an abuse of discretion by the district court in its April 10, 1987 ruling denying the Secretary's motion for relief from judgment pursuant to Rule 60(b)(6).

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No. 87-230

In The
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October Term, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,
Appellant,

v.

JEANNE A. JORDAN,
on behalf of herself and all others similarly situated,
Appellees.

On Appeal From The United States District Court For The Western District Of Oklahoma

MOTION TO DISMISS OR AFFIRM

Appellees move the Court to dismiss the Secretary's appeal for the reason that jurisdiction does not exist under 28 U.S.C. § 1252. The Secretary has not satisfied the requirement of appealing from a ruling holding a federal statute unconstitutional. The instant appeal should also be dismissed because the law of the case was established in an unappealed 1983 final judgment.

Alternatively, should this Court consent to hear the Secretary's appeal, appellees move that the district court order be summarily affirmed on the ground that there was no abuse of discretion.

OPINIONS BELOW

The district court's original decision on the merits granting appellees' motion for summary judgment is contained in the Appendix to the Secretary's Jurisdictional Statement at pps. 23a-40a (hereinafter, "Sec. App."), and also is reported in the CCH Unemployment Insurance Reporter at ¶ 14,768.

———o———

JURISDICTION

The Jurisdictional Statement was filed, following extension of time, on August 5, 1987. By Order of the Clerk dated September 1, 1987, the time to file a responsive pleading was extended to October 5, 1987.

As will be more fully discussed, appellees do not agree that the Secretary has satisfied the jurisdictional prerequisites of 28 U.S.C. § 1252.

———o———

STATEMENT OF THE CASE

A. Statement of Fact

The named plaintiffs in this action are Jeanne A. Jordan and Barbara Leeds. Ms. Jordan was and continues to be disabled due to schizophrenia. Benefits totaling $2,356.90 were unlawfully expended by her payee sister despite not having cared for Ms. Jordan for over one year. No accountings, despite plaintiff's demands, were required of the former payee for in excess of eighteen months.

Ms. Leeds also suffers from a mental impairment. Her payee unlawfully spent nearly $9,000 of her retroactive disability award. Ms. Leeds never received a detailed accounting by her payee.

B. Proceedings Below

Appellees filed this action in September 1979 to challenge the Social Security Administration's failure to monitor or otherwise effectively supervise individuals who are designated as representative payees for the receipt and expenditure of Social Security and Supplemental Security Income benefits. Plaintiffs' claims were based upon 42 U.S.C. §§ 405(a), (b), (j); 1383(a)(2), (c)(1), and (e)(1)(A), and the Due Process Clause of the Fifth Amendment.

In a memorandum opinion dated September 26, 19[illegible], the district court certified the case as a class action pursuant to Rule 23(b)(2), F. R. Civ. P. The scope of the class was nationwide and included all recipients of Social Security benefits and Supplemental Security Income who have representative payees.

Following extensive discovery and cross-motions for summary judgment, the district court rejected the Secretary's position that the Social Security Administration had no obligation to monitor the expenditure of benefits by payees. *Jordan v. Schweiker*, 79-994-W (W.D. Okl., Mar. 17, 1983). (See Sec. App., at 23a) The District Court held that the Secretary had violated the due process rights of beneficiaries by failing to institute a mandatory periodic accounting requirement. (*Id.*, at 34a-37a)

The court's decision was reached after a thorough evaluation of plaintiffs' claims under the exacting stan-

dards set forth by this Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976). District Judge Lee R. West found that the risk of beneficiaries being erroneously deprived of benefits under the Secretary's discretionary procedures was great, and the probable value of mandatory periodic payee accounting to be substantial. Consequently, the district court issued a permanent injunction, and ordered the defendant to implement mandatory periodic accounting procedures nationwide within one year. Plaintiffs' additional claims were denied. *Id.*

On May 10, 1983, the Secretary filed a notice of appeal from that order solely on the accounting issue. However, he later unilaterally moved to dismiss his appeal. On July 14, 1983, the Court of Appeals for the Tenth Circuit granted the Secretary's motion and dismissed the Secretary's appeal. *Jordan v. Heckler*, No. 83-1600.[1] (Supp. App., at 1a) Therefore, as of that date, the law of this case was that the Social Security Administration was required by due process of law to implement mandatory periodic accountings for all beneficiaries within the nationwide class.[2]

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[1]The Secretary inexplicably neglected to discuss this dismissal order in his Jurisdictional Statement, and omitted it from his Appendix. Therefore, appellees have included a copy in Appellees' Supplemental Appendix (hereinafter, Supp. App.).

[2]Plaintiffs' cross-appeal on the issue of a beneficiary's right to administrative review of a decision of "no misuse" of benefits by a payee was not dismissed. The court of appeals affirmed the district court's finding. *Jordan v. Heckler*, 744 F.2d 1387 (10th Cir. 1984). However, in a consolidated appeal, the court of appeals upheld the district court award of attorney fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d). Equally important, Chief Judge Seth specifically noted that "The Secretary did not appeal the trial court's order as to accounting, and indicated that it agreed with it." *Id.* at 1401.

Notwithstanding the effect of the dismissal, the Secretary purported to implement the district court's judgment through a random survey of only ten percent of payees annually rather than mandatory periodic accounting by all payees in the nationwide class. Subsequent to the Secretary's refusal to establish mandatory accounting procedures for all payees, plaintiffs filed a Motion for Order Enforcing Judgment. In response, the Secretary did not argue, and failed to present any evidence, that parental and spousal payees (or any other category) should be exempted from accountings.

By order dated March 26, 1984, the district court reaffirmed the plaintiffs' arguments and explicitly held that the Due Process rights of Social Security and SSI beneficiaries, as established in the 1983 final judgment, could only be protected by requiring periodic annual accountings by all payees. Further, the Secretary was ordered to take "immediate steps" to implement such a system. On July 2, 1984, that order was amended to allow institutional payees to be monitored once every three years under the Secretary's On-Site Review Program.

On Aug. 29, 1984, the Secretary filed a notice of appeal from the March 26, 1984 Order, as amended. Subsequent thereto, the Secretary filed his initial Motion For An Indicative Ruling and Relief From Judgment in the district court pursuant to Rule 60(b)(6), F. R. Civ. P.

In his Rule 60(b) motion, the Secretary argued that recently enacted legislation was in conflict with the 1983 district court judgment. It was asserted that under Section 16 of Pub. L. No. 98-460 (the Social Security Disability Benefits Reform Act of 1984), parental and spousal

payees with beneficiaries in their custody were exempted from accounting.[3] Finally, the Secretary argued that the district court should conform its prior judgment and Order to the changes contained in the congressional legislation.

By order dated January 18, 1985, the district court denied the Secretary's Rule 60(b) motion. Judge West noted that although deference is usually given congressional action, such changes cannot undermine minimal constitutional guarantees. Moreover, the trial judge expressly stated that beneficiaries in the custody of parental or spousal payees were entitled to the same due process protections as all other beneficiaries with representative payees. *Jordan v. Heckler*, Civ. No. C-79-994-W (W.D. Okl.). (Sec. App., at 48a, 54a)

The district court cited *Aune v. Reynders*, 344 F.2d 835 (10th Cir. 1965), as controlling Tenth Circuit precedent for consideration of Rule 60(b) motions. The court agreed with plaintiffs' contentions and explicitly held that " . . . defendant is not entitled to relief from judgment". (*Id.*, at 48a)

In support of its holding, the court reasoned as follows:

> The only way by which the Secretary can avoid the mandatory annual accounting is to establish that beneficiaries' due process rights are being adequately provided through some alternative means. . . . However, no such showing has been made for either of the two

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[3]Section 16 amends Sections 205(j) and 1631(a)(2) of the Social Security Act. 42 U.S.C. § (Supp. III) 405(j), and 1383(a)(2). This was the first occasion on which the Secretary maintained that such payee exemptions should be adopted by the court.

> categories [spousal/parental payees] set out above. Beneficiaries in these two categories have the same rights under the due process clause as do all other beneficiaries for whom representative payees have been appointed.
>
> . . . The Secretary has had several chances to present the necessary evidence and has failed to do so. The Court will not indefinitely delay the termination of this case to allow the Secretary to present evidence which could have been presented at least ten months ago.

(*Id.*, at 54a) The Secretary did not file a notice of appeal from the order either to this Court or the Court of Appeals for the Tenth Circuit.

On Jan. 5, 1987, the court of appeals dismissed the Secretary's appeal on the merits concluding that the Secretary had failed to present arguments pertaining to the March 26, 1984 order (enforcing the 1983 judgment). *Jordan v. Bowen*, 808 F.2d 733 (10th Cir. 1987). Consequently, a unanimous panel held that the Secretary had effectively abandoned those issues in favor of attempting to argue the legislative exemptions. *Id.*, at 736. The appellate court further noted, however, that the Secretary had failed to file a notice of appeal of the Jan. 18, 1985 district court order. Writing for the panel, Judge McWilliams stated that because of this fatal omission, the Rule 60(b) Order was not properly before the court and would not be considered. Thus, the Secretary's appeal was dismissed in its entirety.

Apparently intent upon circumventing the obvious jurisdictional defect occasioned by his failure to file a notice of appeal from the Jan. 18, 1985 denial of relief

from judgment, the Secretary filed a second Rule 60(b) motion in the district court. However, this renewed motion was identical in form and substance to the original.

Once again, the district court found that the Secretary was not entitled to relief. However, this order was not premised upon a constitutional analysis. Rather, the court specifically observed that:

> The Court has not only engaged once in the analysis required by *Mathews v. Eldridge*, 424 U.S. 319 (1976), see Order of March 17, 1983, but also has already considered the legislative provisions cited by the Secretary and the need for protecting the due process rights of those beneficiaries for whom parents or spouses have been appointed representative payees. . . . [*T*]*he Court finds it unnecessary to readdress those arguments. Accordingly, the Secretary's instant Motion for Relief of Judgment should be and is hereby DENIED.*

Jordan v. Bowen, No. Civ. 79-994-W (W.D. Okl., Apr. 10, 1987). (emphasis added) (Sec. App., at 4a, 5a) It is from that order that the instant appeal was taken.[4]

The Secretary's Petition for Rehearing in the court of appeals was summarily denied on June 19, 1987. As this Court is aware, the Secretary has also filed a Petition for Writ of Certiorari from the Jan. 5, 1987 decision by the court of appeals. *Bowen v. Jordan*, 87-245. Appellees have filed a separate response to the Secretary's petition.

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[4]The Secretary has also appealed to the Court of Appeals from the April 10, 1987 district court order denying his Rule 60(b) motion.

ARGUMENT

I. THE COURT HAS NO JURISDICTION TO HEAR THE PRESENT APPEAL UNDER SECTION 1252 AND THE SECRETARY'S APPEAL SHOULD BE DISMISSED

The Secretary maintains that this court has jurisdiction over the present appeal pursuant to 28 U.S.C. § 1252. Without any analysis, the Secretary boldly asserts that direct Supreme Court review of a district court's refusal to order relief from judgment under Rule 60(b) of the Federal Rules of Civil Procedure is encompassed by Section 1252's limited mandatory jurisdiction. Appellees contend, however, that Section 1252, whose lynchpin is the necessity of Supreme Court review when the constitutionality of federal statutes is in issue, cannot support jurisdiction here where the limitations of appellate review under Rule 60(b) prohibit this court from directly addressing the constitutionality of a federal statute.

By its terms, Section 1252 only provides direct appeal to this court when a lower federal court holds an Act of Congress unconstitutional; however, the statute is not to be read literally. *Heckler v. Edwards*, 465 U.S. 870 (1984). Indeed, Justice Marshall, writing for a unanimous *Edwards* court, emphasized that "inherent in the structure of § 1252 is that not all appeals in a case in which an Act of Congress has been held unconstitutional must be taken directly to this Court." 465 U.S. at 880. Only those cases where the "issue on appeal is the holding of statutory unconstitutionality" meet the dictates of § 1252. *Id.* See also *EEOC v. Allstate Insurance Co.*, 467 U.S. 1232

(1984)[5] and *Walters v. National Association of Radiation Survivors*, 105 S.Ct. 3180, 3187-88 (1985).

Section 1252 jurisdiction does not depend on the lower court expressly declaring the federal law unconstitutional. *California v. Grace Brethren Church*, 457 U.S. 393, 405 (1982). If the constitutional legitimacy of a federal statute has been *directly* confronted by the lower court *and* the constitutional issue is the subject of the appeal, then Section 1252 demands that appellate review be to this court and not to the court of appeals. *Walters v. National Association of Radiation Survivors, supra; McLucas v. DeChamplain*, 421 U.S. 21 (1975); *United States v. Raines*, 362 U.S. 17, 20 (1960).

In this case, however, the Secretary has appealed from an order of the district court denying a motion for relief from judgment under Rule 60(b)(6). In reviewing a denial of a Rule 60(b) motion the role of an appellate court is extremely limited. *Browder v. Director, Department of Corrections*, 434 U.S. 257, 263 n. 7 (1978). The sole issue is the propriety of "the District Court's refusal to set aside its own judgment under Rule 60(b)." *In Re Design Classics Inc.*, 788 F.2d 1384, 1386 (8th Cir. 1986).

The substantive merits of the underlying case are not raised on appeal. *Id.* And the Secretary may not use the

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[5]Ironically, this court dismissed the appeal in *Allstate* at the behest of the Solicitor General. However, as in the present case, the Government in *Allstate* had also filed a notice of appeal to the circuit court. Thus, the resulting jurisdictional dismissal in this court simply allowed the government to pursue its appeal in the Fifth Circuit. Similarly, if this court grants appellees' motion to dismiss, the Secretary will still be able to pursue his appeal in the Tenth Circuit.

guise of review of a Rule 60(b) denial as a substitute for an appeal of the merits. See, e.g., *Lepore v. Vidockler, Inc.*, 792 F.2d 272 (1st Cir. 1984).

In addition to limitations on the substantive issues that can be raised, the standard of appellate review of a denial of a Rule 60(b) motion is governed by the more restrictive abuse of discretion standard. *Browder, supra.* Indeed, the abuse of discretion standard to be used in reviewing a Rule 60(b) case is even more limited than in other appellate situations where the standard is applicable.

> A motion under Rule 60(b) often puts to a court a question without a right answer. The district judge must weigh incommensurables—the value of finality, the probability that an error affected the outcome of the proceeding, the probability that a second go-round would produce a 'better' outcome, the costs of that second proceeding to the parties (and ultimately to society as the finality of judgments is undercut). Dealing with these intersecting planes of legal argument is a task of great subtlety, calling on all the skills of the district judges. It is not, however, a task that gives rise to 'error' (as opposed to questionable exercise of judgment), unless the judge leaves something important out of his analysis. That is why we have been so deferential in Rule 60(b) cases to decisions not to reopen.

Metlyn Realty Corp. v. Esmark, Inc., 763 F.2d 826, 831 (7th Cir. 1985).

In short, in order to find an abuse of discretion in denying a rule 60(b) motion, this court must find that "no reasonable man could agree with the district court." *Smith v. Widman Trucking & Excavating, Inc.*, 627 F.2d

792, 795-96 (7th Cir. 1980). See also *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, 685 F.2d 1065, 1071 (9th Cir. 1982) aff'd in part, rev'd in part (on other grounds), 466 U.S. 435 (1984) (a Rule 60(b) decision will be reversed "only upon a clear showing of abuse of discretion"); *Taylor v. United States Parole Commission*, 734 F.2d 1152, 1155 (6th Cir. 1984) (to find abuse of discretion the appellate court must have "a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors").

Consequently, the issue on appeal in this case is not, as the Secretary contends, the constitutionality of a federal statute. Rather, this court is limited to determining whether Judge West acted unreasonably when he determined that the final judgment he entered in 1983 should not be vacated. In this procedural posture the constitutionality of the 1984 federal law, which the Secretary attempts to raise herein, is not before this court.

In fact, as the record below demonstrates, the district court itself never directly confronted the constitutionality of the new federal statute; nor was it required to do so. In its original 1983 decision the district court was only asked to determine the constitutionality of the Secretary's lack of accounting procedures; there was no accounting statute to review. Although the Secretary originally appealed from that holding, he subsequently voluntarily dismissed that appeal. See discussion at p. 16, *infra*. At that point, the merits of this case were *res judicata*.

Judge West's 1984 order clarifying that annual accountings were required for all payees was only an order enforcing his earlier final judgment and not a ruling on the underlying merits of the case. As a result, in denying the Secretary's subsequent motions to vacate the 1983 and 1984 orders, Judge West simply held that there were not sufficient exceptional circumstances to cause the court to vacate its previous detailed and carefully thought out rulings.[6] The district court never analyzed, nor was it obligated to do so, the constitutional validity of any federal statute.

Now, under the guise of § 1252, the Secretary asks this court to determine the constitutionality of a 1984 law without any review of that issue by the lower court. However, as Justice Brennan noted in his dissent in *Walters*, "a fully consummated determination that a federal statute is unconstitutional" is a necessary predicate of Supreme Court jurisdiction under § 1252. 105 S.Ct. at 3201 and 3203. The majority in *Walters* did not disagree that § 1252 review is limited to cases where the lower court has fully confronted the constitutionality of a federal statute; rather, the dispute in *Walters* was whether a preliminary injunction constituted a "fully consummated determination." Since the district court in *Walters* did in fact evaluate the ultimate constitutional issue that was later appealed to the Supreme Court, the majority found jurisdiction under § 1252. The same cannot be said for the lower court here. In fact, appellees can find no case like

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[6]This court has also long recognized that Rule 60(b) motions should be granted only in rare circumstances. *Ackerman v. United States*, 340 U.S. 193 (1950).

the present one where this court has found jurisdiction under § 1252 and the constitutionality of the federal statute in question had not been directly addressed by a lower court.

Moreover, the Secretary attempts to raise this previously undiscussed constitutional issue not in a direct appeal from a ruling on the merits of the case, but in a Rule 60(b) appeal from a refusal to vacate the final judgment entered four years earlier. The combination of the manner in which the issue of the statute's validity was presented to the district court and the limitations of appellate review of Rule 60(b) motions demonstrates that the constitutionality of the 1984 accounting amendments is not before this court.

In short, given the complicated procedural background of the case, this Court could not possibly confront the constitutionality of a federal statute. The sole prerequisite of § 1252 jurisdiction—the question of a statute's constitutionality—is missing. *Heckler v. Edwards, supra.* As a result the Secretary's appeal must be dismissed.

II. THE DOCTRINE OF THE "LAW OF THE CASE" REQUIRES THAT THE SECRETARY'S APPEAL BE DISMISSED

The Secretary has erroneously described the April 10, 1987 district court order as holding the 1984 representative payee exemptions as unconstitutional. Notwithstanding the failure to point out in his brief supporting language from the order, such a conclusion is a gross distortion of both the substance and unambiguous language contained in the opinion. Furthermore, the Secretary's

arguments ignore the fact that all salient constitutional questions were fully addressed in Judge West's 1983 final judgment and became the law of the case.

In denying the Secretary relief from the 1983 judgment a second time, Judge West ". . . again [found] that the Secretary is not entitled to the relief sought." (Sec. App., at 4a) The language of the Order clearly reflects that the constitutional questions regarding mandatory payee accounting were properly weighed in the court's 1983 judgment as required under the balancing test established by this Court in *Mathews v. Eldridge, supra.*

In the 1983 final judgment, Judge West explicitly held:

> Applying the factors in *Mathews v. Eldridge, supra,* this Court again finds that the private interest of beneficiaries in the receipt and proper use of social security benefits is substantial. This Court also finds that the risk of an erroneous deprivation of this interest through the procedures used is great and the probable value of mandatory accounting is substantial. This Court also finds that the fiscal and administrative burdens that mandatory accounting would entail would not be great. . . .
>
> This Court concludes that the discretionary accounting procedures now in effect do not provide due process to the social security beneficiaries for whom representative payees have been appointed. . . . Plaintiffs' Cross-Motion for Summary Judgment with respect to the provision for mandatory periodic accounting should be and is hereby Granted. Defendant is directed to implement appropriate mandatory periodic accounting procedures within one year from the date of this Order.

Jordan v. Schweiker, supra. (Sec. App., at 37a).

Although the Secretary initially decided to appeal the mandatory accounting ruling, he later moved to dismiss. On July 14, 1983, the Court of Appeals for the Tenth Circuit ordered the appeal dismissed. *Jordan v. Heckler*, No. 83-1600. (Supp. App., at 1a) As of that date, therefore, the question of the constitutional need for mandatory periodic accountings by all representative payees was resolved, and the preceding district court judgment was final. The district court holding that due process of law required accountings of all payees was *res judicata*. The Secretary had three years, two evidentiary hearings, and numerous motions and briefs within which to present relevant evidence and legal arguments. He lost. Furthermore, the Secretary expressly decided *not* to appeal. If he desired to appeal constitutional questions, he should have done so, and the Secretary cannot employ a Rule 60(b) motion four years later in lieu of a timely appeal. See p. 11, *supra*. The doctrine of the "law of the case" also precluded further consideration. *Arizona v. California*, 460 U.S. 605 (1983).

In his order of April 10, 1987, Judge West further indicated that the Secretary in January, 1985 submitted for consideration the legislative provisions in question. In response, the court expressed in strong language its displeasure with the Secretary's tardy attempt to reargue constitutional questions:

> Defendant has not offered any evidence that the due process requirements relied upon by this Court in its prior orders have been satisfied. The Court quite specifically ruled in its March 17, 1983 order that due process required mandatory periodic accounting by all payee representatives.

> . . . However, no such showing has been made for the two categories set out above. Beneficiaries in these two categories [who have parental and spousal payees] have the same rights under the due process clause as do all other beneficiaries for whom representative payees have been appointed.
>
> *Defendant should not read this order as an invitation to present further evidence on the two categories of beneficiaries above . . . [T]he Secretary has had several chances to present the necessary evidence and has failed to do so.*

Jordan v. Heckler, supra, (emphasis added) (Sec. App., at 54a) Despite the clear admonishment by the district court, and having failed to appeal the 1983 final judgment or file a notice of appeal from the 1985 denial of relief, the Secretary sought to resurrect his case by filing a second Rule 60(b) motion.

The result expressed in the April 10, 1987 order was, therefore, entirely predictable. Judge West, for the second time, denied relief from judgment and refused to ". . . readdress those arguments presented by the Secretary." *Jordan v. Bowen, supra.* (Sec. App., at 5a) The order is in full accord with the need for finality and an end to litigation.

This Court has extended the doctrine of the "law of the case" to decisions of a district court where, as here, *res judicata* has attached to a final decision. *Arizona v. California, supra,* at 619. Moreover, the doctrine demands that whenever a ruling of law is issued in a case, that decision will "govern the same issues in subsequent stages of the same case." *Id.* at 618.

As stated in the often quoted passage from *White v. Murtha,* 377 F.2d 428, 431 (5th Cir. 1967) (footnotes omitted):

> The 'law of the case' rule is based on the salutary and sound public policy that litigation should come to an end. It is predicated on the premise that 'there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions or speculate of chances from changes in its members,' and that it would be impossible for an appellate court 'to perform its duties satisfactorily and efficiently' and expeditiously 'if a question, once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal' thereof.

The Secretary's second Rule 60(b) motion was an attempt to abrogate this policy. Judge West, recognizing the need for finality and implicitly acknowledging that *res judicata* attached to the 1983 judgment, refused to reconsider constitutional issues again. Accordingly, the Secretary's renewed Rule 60(b) motion was forcefully denied.

To avoid the effects of the "law of the case" doctrine, a party must show that the "evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice." *White v. Murtha, supra,* 377 F.2d at 432. See also, *Silkwood v. Kerr-McGee,* 769 F.2d 1451, 1462 (10th Cir. 1985). These exceptions are to be narrowly applied and some, such as manifest injustice, are to be used only in truly "exceptional circumstances." *Laffey v. Northwest Airlines,* 740 F.2d 1071, 1082 (D.C. Cir. 1984), cert. denied 105 S.Ct. 939 (1985).

The Secretary has not even discussed and, in any event, cannot demonstrate that these exceptions to the

"law of the case" rule are applicable here. Instead, the Secretary implied that a federal statute has been amended and, somehow, is determinative. As Judge West recognized, however, statutory alterations cannot affect the constitutional rights that are the controlling legal principle in this case.

Only if this Court had dramatically altered the due process analysis could the Secretary even suggest that the controlling law exception might be applicable. On the contrary, however, the *Mathews v. Eldridge, supra,* analysis employed by Judge West remains the applicable constitutional standard. The controlling law is unchanged. *Brock v. Roadway Express, Inc.,* 55 U.S.L.W. 4530, 4532 (April 22, 1987).

In sum, the Secretary is bound by the district court's unappealed final judgment that due process requires mandatory accountings for *all* payees. The doctrine of the "law of the case" precluded the district court from readdressing issues resolved in the 1983 final judgment. Accordingly, the doctrine is fully applicable here and constitutes a valid basis for dismissal of the Secretary's appeal by this Court.

III. THIS COURT SHOULD SUMMARILY AFFIRM THE RULING OF THE DISTRICT COURT SINCE THERE WAS NO ABUSE OF DISCRETION

If this Court agrees to accept the present appeal, appellees urge disposition of the matter by an order summarily affirming the ruling below. Summary affirmance is appropriate since the only issue the Secretary has appealed is the propriety of the district court's denial of

the Secretary's Rule 60(b) motion to vacate or amend the final judgment.

The Court's role in reviewing a denial of a Rule 60(b) motion, as appellees have explained above, is limited to determining whether the district court abused its discretion in deciding not to reopen its earlier judgment. *Browder v. Director, Department of Corrections, supra,* 434 U.S. at 263, n.7. See also *System Federation v. Wright,* 364 U.S. 642, 648 (1961) (district court has wide latitude in determining whether to grant a Rule 60(b) motion). Consequently, the sole issue that the Secretary presents to this court is whether Judge West acted unreasonably in concluding that the Secretary had failed to produce sufficient evidence or articulate sufficient reasons to justify the court vacating its final judgment. Appellees submit that the record here abundantly demonstrates that Judge West did not abuse his discretion in denying the Secretary's Rule 60(b) motion, so that the only appropriate course of action for this court is to summarily affirm the ruling below.

To determine whether the Secretary's motion to vacate should be granted, this court, as well as the district court, must apply the standards established in *United States v. Swift & Co.,* 286 U.S. 106, 114, 119 (1932). There, recognizing the need for finality and the critical importance of the principle of *res judicata,* Justice Cardozo crafted a test which allows the altering of final judgments *only* in rare and exceptional circumstances:

> There is a need to keep in mind steadily the limits of our inquiry. . . . We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. The [decree], whether right or wrong is not subject to

> impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting. The inquiry . . . is whether the changes are so important that dangers once substantial, have become attenuated to a shadow. . . . Nothing less than a clear showing of grievous wrong by new and unforseen conditions should lead us to change what was decreed after years of litigation . . . .

More than thirty years later, Justice Blackmun, while sitting on the Court of Appeals, explained and amplified the *Swift & Co.* standards:

> Placed in other words, this means for us that modification is only cautiously to be granted; that some change is not enough; that the dangers which the decree was meant to foreclose must almost have disappeared; that hardship and oppression, extreme and unexpected are significant; and that the movants' task is to provide close to an unanswerable case. To repeat: caution, substantial change, unforeseenness, oppressive hardship, and a clear showing are the requirements.

Humble Oil & Refining Company v. American Oil Co., 405 F.2d 803, 813 (8th Cir. 1969)[7]

In the present case, Judge West correctly concluded that the Secretary had not met the difficult burden of demonstrating that this case meets the strict *Swift & Co.*

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[7]The principles crafted by Justice Cardozo and explained by Justice Blackmun unquestionably remain viable today and are employed by all the circuit courts. See, e.g., *Williams v. Lesiak*, 822 F.2d 1223 (1st Cir. 1987); *Ruiz v. Lynaugh*, 811 F.2d 856 (5th Cir. 1987); *Dowell by Dowell v. Board of Education of Oklahoma*, 795 F.2d 1516 (10th Cir. 1986), cert. den. 107 S.Ct. 585 (1987); *Moolenaar v. Government of Virgin Islands*, 822 F.2d 1342 (3d Cir. 1987).

test. The Secretary's sole argument seems to be that the enactment of the 1984 amendments, which authorized an accounting program for only a portion of the representative payees subsequent to the district court's order holding that accountings for all payees are constitutionally mandated, meets the *Swift & Co.* standards. In short, the Secretary seems to believe that, because a law was passed granting only part of the relief given to plaintiffs by the courts, the district court had no choice but to modify its constitutionally based final judgment.[8]

However, as the courts of appeals have often noted, the mere passage of legislation which "might accomplish much of what a . . . decree was designed to achieve cannot be viewed as justification for vacating the decree." *Coalition of Black Leadership v. Ciani*, 570 F.2d 12, 14 (1st Cir. 1978). This is particularly true here where the district court's 1983 order is premised on the constitution. Congressional enactments cannot supercede constitutional requirements. Thus, it would be illogical to conclude, as the Secretary argues, that a congressional decision which eliminates more than half of the payees from an accounting program can overrule the lower court's constitutionally based injunction requiring accountings for all payees. See, e.g., *Williams v. Atkins*, 786 F.2d 457, 461 (1st Cir. 1986).

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[8]Appellees are forced to speculate as to the Secretary's reasoning because he has not addressed the propriety of the district court's ruling on the Rule 60(b) motion in his Jurisdictional Statement. Instead, the Secretary has only briefed the question of the constitutionality of the new 1984 law. Nowhere in his Jurisdictional Statement does the Secretary even mention the applicable standards to be applied either by the district court or this court in determining the appropriateness of a Rule 60(b) motion.

As this court noted in *Swift & Co.*, the test for determining whether the final judgment can be altered is whether the dangers which the district court originally sought to address have disappeared as a result of some new and unanticipated development. Even the Secretary recognizes that he cannot make such a contention here. By definition the new 1984 accounting amendment fails to address the constitutional needs of the majority of the payees. Thus, the dangers to the majority of the payees that were the basis for the lower court's ruling are not remedied by the 1984 amendments. On the contrary, Congress left most of the payees in the same place Judge West found them in 1983—with absolutely no due process protections. In light of these circumstances the court below could not have concluded that the dangers to the plaintiffs had become "attenuated to a shadow."[9]

Similarly, the Secretary has not argued, as the *Swift & Co.* standards require, that, absent Rule 60(b) relief, he will suffer extreme and unanicipated hardship. In fact, any current difficulties faced by the Secretary are a result of the district court's original order and were fully known to the Secretary at the time the order was entered. The "hardship", if any exists, has not been created by any intervening developments. The 1984 amendments *do not* increase the burdens on the Secretary. Indeed, for

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[9]In addition, the Secretary's own internal study, which was before the district court, also concluded that accountings were necessary to protect the rights of beneficiaries who had payees. OA Representative Study, Final Report, Feb. 8, 1983, at pps. 9-10. There is nothing in that study which suggests that merely providing accountings for a few payees will satisfy the needs of the remaining unprotected beneficiaries.

some of the payees, they conform to the district court's order. Congress has not asked the Secretary to do anything greater than or inconsistent with Judge West's orders.

In addition, the Secretary has had numerous opportunities to present arguments and/or evidence to the district court demonstrating that accountings were not necessary for spousal and parental payees. Yet, despite years of litigation, numerous motions, and the Secretary's participation in and knowledge of the 1984 Congressional action, the Secretary never attempted to bring this issue before the district court. See District Court Order of Jan. 18, 1985. (Sec. App., at 54a) "A party that has not presented known facts helpful to its case by witnesses available to it 'when it had the chance cannot ordinarily avail itself of Rule 60(b) after an adverse judgment has been handed down' . . . . Rule 60(b) is not a substitute for appeal." *Moolenaar v. Government of Virgin Islands, supra,* 822 F.2d at 1347 (quoting from *Good Luck Nursing Home Inc. v. Harris,* 636 F.2d 572, 577 (D.C. Cir. 1980)). See also *Rajender v. University of Minnesota,* 730 F.2d 1110 (8th Cir. 1984).

However, in the present case, the Secretary is undoubtedly attempting to use a series of Rule 60(b) motions exactly for that purpose. In fact, the Secretary unashamedly admits that his goal here is to have an appellate court reach the constitutional issues raised by the merits of appellees' case. This is evidenced first by the Secretary's repeated pleas to both this court and the Tenth Circuit that he desperately needs an opportunity to have an appellate court re-examine the basic constitutional rulings of the lower court. This apparently ex-

plains the Secretary's numerous *Jordan* appeals. See discussion at pp. 4-9, *supra*.

Second, the primary constitutional issues addressed in the Jurisdictional Statement relate not to the constitutionality of the new 1984 accounting amendments, but to the constitutional basis for the district court's original decision. The Secretary seeks not to protect the constitutionality of a federal law, but to undercut the validity of the district court's final judgment which the Secretary himself explicitly chose not to contest on appeal. See Tenth Circuit Order of July 14, 1983. (Supp. App., at 1a) The Secretary's actions here are those of a desperate litigant who attempts to correct a bad strategic decision by trying to use Rule 60(b) as a way out of his dilemma.

Thus, the Secretary now seeks to employ Rule 60(b) as a guise for impeaching the validity of the lower court's original unappealed final judgment. As Justice Cardozo noted more than 50 years ago, such actions are prohibited. *United States v. Swift & Co., supra.* The courts have "stressed that Rule 60(b)(6) should not be used to relieve a party of the consequences of voluntary litigation choices or improvident strategic decisions." *Randall v. Merrill Lynch*, 820 F.2d 1317, 1321 (D.C. Cir. 1987); *Ackerman v. United States, supra.*

In sum, the Secretary has not demonstrated the kind of "unanswerable case" that Justice Blackmun noted would be necessary before the district court can be required to reopen and modify its final judgment in this case. In light of the Secretary's inability to meet the strict *Swift & Co.* standards, there is no doubt that Judge

West did not abuse his discretion in denying the Secretary's Rule 60(b) motion. Consequently, the district court's ruling should be summarily affirmed.

———o———

CONCLUSION

The Court should dismiss for lack of jurisdiction and based upon the doctrine of the law of the case or, alternatively, summarily affirm since there was no abuse of discretion by the district court.

Respectfully submitted,

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NEAL S. DUDOVITZ
GILL DEFORD
Attorneys for Appellees

October, 1987.

No. 87-230

—o—

In the Supreme Court of the United States

October Term, 1987

—o—

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,

Appellant,

v.

JEANNE A. JORDAN,
on behalf of herself and all others similarly situated,

Appellees.

—o—

On Appeal From The United States District Court For The Western District Of Oklahoma

—o—

MOTION TO DISMISS OR AFFIRM

—o—

APPELLEES' SUPPLEMENTAL APPENDIX

—o—

Court of Appeals Order of July 14, 1983 ..... 1a

MAY TERM—JULY 14, 1983

Before Honorable Monroe G. McKay and Honorable James K. Logan, Circuit Judges

JEANNE A. JORDAN, individually and on behalf of all other persons similarly situated,	)	
Plaintiff-Appellee,	)	
vs.	)	No. 83-1600
MARGARET HECKLER, individually and in her official capacity as Secretary of the Department of Health and Human Services,	)	
Defendant-Appellant.	)	

This matter comes on for consideration of the Secretary of Health and Human Services to dismiss the captioned appeal.

Upon consideration whereof, the motion is granted. The captioned appeal is dismissed. This order does not dispose of the appeal in 83-1636, which was filed as a cross-appeal to the captioned appeal.

HOWARD K. PHILLIPS, CLERK

By: /s/ ROBERT L. HOECKER
Robert L. Hoecker
Chief Deputy Clerk

Supreme Court, U.S.
FILED
OCT 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-230

In the Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

JEANNE A. JORDAN, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

REPLY BRIEF FOR THE APPELLANT

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-230

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

JEANNE A. JORDAN, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

REPLY BRIEF FOR THE APPELLANT

The district court has held unconstitutional the exclusion of certain "representative payees"—principally parents or spouses who live with the beneficiary—from the requirement under the Social Security Act that representative payees submit to the Secretary of Health and Human Services an annual accounting of their expenditures on behalf of the beneficiary. 42 U.S.C. (Supp. III) 405(j)(3)(B), 1383(a)(2)(C)(ii). The effect of the district court's holding would be to require the Secretary to insist upon an accounting from the representative payees for some three million more beneficiaries than Congress intended.

We have demonstrated in the jurisdictional statement: (a) that an erroneous or improper expenditure of funds by a representative payee is private conduct beyond the reach of the Due Process Clause (J.S. 16-18); (b) that the Secretary's payment of benefits to a properly selected representative payee likewise does not implicate the Due Process Clause, at least in the absence of a request to terminate the payee's status or knowledge by the Secretary

of derelictions that should lead him to do so sua sponte (J.S. 18-20); and (c) that even if the Due Process Clause is implicated in this setting, the exception from the accounting requirement for parents and spouses is fully consistent with due process because the familial bond furnishes strong protection against misapplication of funds, an accounting requirement would unnecessarily intrude into the family relationship, and adequate protection is afforded by the less intrusive requirement that the Secretary verify periodically that the parent or spouse payee continues to live with the beneficiary (J.S. 21-23).[1]

Appellees do not respond to the foregoing arguments in support of the constitutionality of the statutory scheme Congress enacted.[2] Instead, they seek in various ways to have the Court avoid addressing the constitutional issue on this direct appeal. All of appellees' avoidance tech-

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[1] Governmental institutions that are representative payees also are excepted from the accounting requirement, although the Secretary must establish a monitoring system for state institutions (42 U.S.C. (Supp. III) 405(j)(3)(C) and (D), 1383(a)(2)(C)(iii) and (iv)). Appellees have not shown that this monitoring system would afford inadequate protection, and in fact the district court previously had excluded governmental institutions for the mentally retarded from the annual accounting program because they are subject to monitoring (App. 44a-47a).

[2] Appellees also do not respond to our submission (J.S. 20-21 n.8) that appellees Jordan and Leeds could not properly represent a class challenging the absence of an accounting requirement for parents, spouses, and governmental institutions under the 1984 Amendments, since (a) the representative payee for each in fact did submit an accounting upon request, (b) there was no finding of wrongful expenditures by either payee that would constitute a "deprivation" of property even under appellees' theory that the actions of private payees are covered by the Due Process Clause, and (c) the representative payees whose actions Jordan and Leeds challenged were not their spouses or parents or a governmental institution, and they therefore would not have been covered by the statutory exemptions if the statutory accounting requirement had been in effect at the time. See J.S. 5-6.

niques are unavailing. The statutory provisions passed by Congress to address the subject of accounting by representative payees are entitled to a presumption of constitutionality – and to far greater respect in the courts than appellees urge.

1. Appellees first contend (Mot. to Dis. or Aff. 9-14) that the Court does not have jurisdiction of this appeal under 28 U.S.C. 1252 because the constitutional question is presented in the context of the district court's denial of the Secretary's motion for relief from judgment under Fed. R. Civ. P. 60(b), which ordinarily is reviewable only for an abuse of discretion. This contention is without merit.

Section 1252 provides for a direct appeal from *any* "interlocutory or final * * * order * * * holding an Act of Congress unconstitutional in *any* civil action" to which the government is a party (emphasis added). There is no exception for situations in which the Act of Congress was passed after the entry of a judgment addressing the same subject matter, so that the constitutionality of the statute could be presented to the court only in a motion for relief from that judgment. Nor is there any exception for orders that are reviewable under an abuse-of-discretion standard. To the contrary, the Court recently held that a preliminary injunction barring enforcement of a federal statute on constitutional grounds may be appealed to this Court under 28 U.S.C. 1252, even though a preliminary injunction ordinarily is subject to review only for abuse of discretion. *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 316-319 (1985); compare *id.* at 341-344 (Brennan, J., dissenting).

An implicit exception for orders denying Rule 60(b) motions also would be inconsistent with the broad purpose of Section 1252 to provide for direct review in this Court of any judicial decision that is "adverse to the constitutionality of an Act of Congress" or "impair[s] [its] enforcement,"

and thereby "frustrates the will of Congress" (*Walters*, 473 U.S. at 318, 319). See generally *Heckler* v. *Edwards*, 465 U.S. 870, 879-883 (1984). Congress exempted parents, spouses, and governmental institutions from the mandatory annual accounting requirement in direct response to the district court's March 1984 order in this case. The district court's refusal to amend its nationwide order to exempt those payees was clearly "adverse" to the constitutionality of the 1984 Act and unquestionably "frustrate[d] the will of Congress."

2. Appellees argue (Mot. to Dis. or Aff. 13), however, that when the district court passed on the Secretary's motions to vacate, it simply held that "there were not sufficient exceptional circumstances" to cause the court to vacate its prior ruling, and that the court therefore "never analyzed, nor was it obligated to do so, the constitutional validity of any federal statute." Appellees are wrong. The district court was required to consider the constitutionality of the intervening statutory amendments when it considered the Rule 60(b) motions, and it in fact did so.

a. An injunction cannot be given prospective effect when intervening legislation renders it inconsistent with the underlying statutory framework, and it is an abuse of discretion for a court to decline to revise the injunction in such circumstances. *System Federation* v. *Wright*, 364 U.S. 642, 648-650 (1961); see also *Hodges* v. *Snyder*, 261 U.S. 600 (1923); *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856). For this reason, if the statutory exemptions passed in 1984 are constitutional, the district court's injunction cannnot be given prospective effect to the extent it requires co-resident spouses and parents and governmental institutions to render an annual accounting. The district court therefore was required to consider the constitutionality of the 1984 amendments.

The district court's duty to consider the constitutionality of the 1984 amendments was reinforced by other factors.

In March 1984, when the district court rejected the Secretary's proposal for an accounting by a 10% sample of all representative payees and ordered the Secretary to require an annual accounting of all representative payees, it had no occasion to consider whether parents and spouses who live with the beneficiary should be exempted. See App. 41a-43a. Thereafter, Congress addressed the accounting issue with specific reference to this case and concluded that "it is neither necessary nor appropriate to require governmental supervision or detailed accounting in the case of close familial relationships (parent and child or spouses living together)" (S. Rep. 98-466, 98th Cong., 2d Sess. 29 (1984))—although Congress afforded substitute but less intrusive protection by requiring the Secretary to verify periodically that the payee still lives with the beneficiary. Because this Court "has been willing to assume a congressional solicitude for fair procedure" (*Califano* v. *Yamasaki*, 442 U.S. 682, 693 (1979)) and has paid considerable deference to Congress's assessment of the appropriate procedures under a statutory benefits program (*Walters*, 473 U.S. at 319-320, 330-331 n.12; *Schweiker* v. *McClure*, 456 U.S. 188, 200 (1982); *Mathews* v. *Eldridge*, 424 U.S. 319, 349 (1976)), Congress's independent assessment of the competing considerations required a reassessment by the court.

b. What is more, the district court in fact *did* consider the constitutionality of the 1984 amendments, albeit both cursorily and erroneously. The court initially discussed the constitutional issue in its January 18, 1985, order addressing the Secretary's first motion for relief from judgment (see App. 54a), although the court concluded that it did not have jurisdiction to render a decision on that question because the Secretary's appeal was pending in the Tenth Circuit (App. 48a, 51a, 55a). Similarly, when it denied the Secretary's second Rule 60(b) motion on April 10, 1987, the district court stated: "The Court has reviewed the

[second] motion and the objections thereto of the plaintiffs *and again finds that the Secretary is not entitled to the relief sought*" (*id.* at 4a (emphasis added)).[3] In other words, the court "again [found]]" that the statutory exceptions to the annual reporting requirement are unconstitutional. Moreover, by virtue of the court's obligation to vacate the injunction if it concluded that the statutory amendments are valid, a finding that they are unconstitutional was a " 'necessary predicate' " to the denial of relief. Compare *California* v. *Grace Lutheran Church*, 457 U.S. 393, 405 (1982) (quoting *United States* v. *Clark*, 445 U.S. 23, 26 n.2 (1980)).

3. Appellees are wrong in contending (Mot. to Dis. or Aff. 14-19) that the doctrine of law of the case requires that the appeal be dismissed. Appellees base this contention on their view that the district court's March 17, 1983, order held that accounting is required of *all* representative payees on an *annual* basis, and that the Secretary's failure to appeal that order forever bars reconsideration of that issue by the district court. In fact, however, the district court in March 1983 did not specifically order the Secretary to require annual accounting by all representative payees; it merely ordered the Secretary to implement "appropriate mandatory periodic accounting procedures" within one year (App. 37a). The Secretary proposed to comply with the March 1983 order by implementing a system of accounting for a 10% sample of payees each year (subject to a follow-up audit), which obviously indicates that the Secretary did not construe the March 1983

[3] The court did not elaborate upon its holding. It merely noted that it had already engaged in the analysis required by *Mathews* v. *Eldridge* and had considered the legislative provisions concerning parents and spouses, and for these reasons "[found] it unnecessary to readdress those arguments presented by the Secretary" (App. 4a-5a).

order to have already mandated annual accounting by all payees.[4]

Although the district court in its March 1984 order rejected the 10%-sample approach and instead mandated universal annual accounting, the court did not base its rejection on the premise that it had already mandated universal annual accounting in the March 1983 order and that the Secretary's 10%-sample proposal therefore was foreclosed by principles of res judicata or law of the case. See App. 41a-43a. The court likewise did not state in its 1985 and 1987 orders addressing the Secretary's Rule 60(b) motions that the Secretary was barred by res judicata or law of the case from arguing that co-resident spouses and parents and governmental institutions should be exempted under the intervening statutory amendments (see *id.* at 49a-50a, 2a); instead, the court considered and rejected the Secretary's contentions on the merits (see *id.* at 52a-55a, 4a-5a). Accordingly, appellees are wrong in arguing that the Court does not have jurisdiction of this direct

[4] This construction of the March 1983 order of course explains the Secretary's decision not to pursue an appeal of the March 1983 order. For this reason, and contrary to appellees' repeated suggestion (Mot. to Dis. or Aff. 4, 12, 16, 25), the Secretary's dismissal of that appeal after a protective notice of appeal was filed (see Mot. to Dis. or Aff. App. 1a) did not manifest acquiescence in universal annual accounting. Appellees quote (Mot. to Dis. or Aff. 4 n.2) a passage from the opinion that the Tenth Circuit rendered on their appeal of other aspects of the March 1983 order, which stated that "[t]he Secretary did not appeal the trial court's order as to accounting, and indicated that he agreed with it" (App. 71a). Appellees fail to quote the succeeding sentences in the opinion: "The Secretary asserts in this appeal that she did not oppose *in principle* the accounting claim in the trial court. The trial court's original order was in general terms" (*ibid.* (emphasis in original)). The Secretary's agreement "in principle" to some accounting procedures reflects the fact that an accounting program had been in place prior to 1978 (although, significantly, that program also exempted custodial spouses and parents and governmental institutions (see S. Rep. 98-466, *supra*, at 29)).

appeal (and that the appeal therefore should be dismissed) because the district court's April 10, 1987, order did not actually hold an Act of Congress unconstitutional, but rather rejected the Secretary's motion on the procedural ground of res judicata or law of the case.

4. Finally, appellees, without even addressing the merits of the constitutional issue, make the astonishing suggestion (Mot. to Dis. or Aff. 19-26) that if the Court concludes that it has jurisdiction of this appeal under 28 U.S.C. 1252, it should summarily affirm the district court's April 10, 1987, order denying the Secretary's motion for relief from judgment. In appellees' view, the district court did not abuse its discretion in concluding that the Secretary had not presented sufficiently compelling circumstances to set aside the judgment.

As we have explained above, however, the district court was required to vacate its injunction if the statutory exemptions passed in 1984 are constitutional. See page 4, *supra*. For the reasons we have set forth in the jurisdictional statement (at 18-23), to which appellees have chosen not to respond on this appeal, those exemptions clearly are constitutional. The district court therefore abused its discretion in refusing to vacate the March 1983 and March 1984 orders insofar as they require annual accounting by co-resident spouses and parents and governmental institutions.

Appellees attempt to avoid that conclusion by relying on "the need for finality and the critical importance of the principle of *res judicata*" (Mot. to Dis. or Aff. 20). That reliance is singularly misplaced in this case. When the Rule 60(b) motions were filed, the Secretary's appeal of the March 1984 order was still pending in the court of appeals. Those motions therefore were in no way used as a substitute for an appeal of the March 1984 order, and that

order had not yet become final or assumed a binding res judicata or law-of-the-case effect. Compare *Ackerman* v. *United States*, 340 U.S. 193, 198 (1950). Indeed, because the injunction has been stayed pending appeal, reversal by this Court of the April 10, 1987, order denying the Secretary's Rule 60(b) motion would not alter the status quo or upset settled expectations.[5]

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[5] Appellees err in contending that relief was properly denied because the 1984 amendments "left most of the payees * * * with absolutely no due process protections" (Mot. to Dis. or Aff. 23). The 1984 amendments contain the new requirement that the Secretary periodically verify that co-resident spouses and parents continue to live with the beneficiary (42 U.S.C. (Supp. III) 405(j)(3)(B), 1383(a)(2)(C)(ii)), which ensures the continued existence of the bonds and responsibilities that furnish protection at least as strong as an annual accounting. Additional protection is afforded by enhanced criminal penalties for misuse of funds and the Secretary's authority to demand an accounting even from exempted payees if he has reason to believe that they are misusing funds. See J.S. 9, 22.

Equally without merit is appellees' contention (Mot. to Dis. or Aff. 23) that relief from judgment is not warranted because the Secretary will not suffer "extreme and unan[t]icipated hardship" if relief is denied. " 'The presumption of constitutionality which attaches to every Act of Congress is * * * an equity to be considered in favor of [the Secretary] in balancing hardships.' " *Bowen* v. *Kendrick*, No. A-99 (Aug. 10, 1987) (Rehnquist, C.J., in Chambers) (quoting *Walters* v. *National Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in Chambers)). Moreover, in this case, the burden of the accounting requirement would fall not only on the Secretary, but also on the representative payees for more than three million additional beneficiaries. Congress specifically determined when it enacted the 1984 amendments that governmental supervision of and mandatory accounting by parents and spouses living with the beneficiary were both unnecessary and inappropriate. S. Rep. 98-466, *supra*, at 29. That burden weighs heavily in favor of vacating the district court's March 1983 and March 1984 orders to the extent necessary to give effect to the exemptions in the 1984 amendments.

For the foregoing reasons and those stated in the jurisdictional statement, it is respectfully submitted that probable jurisdiction should be noted.

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OCTOBER 1987

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